

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5387
Conference Calendar

JERRY LEVIER,

Plaintiff-Appellant,

versus

TOWN OF PORT BARRE ET AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 92-cv-1276
- - - - -

(May 17, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Jerry Levier argues that the district court erred by granting defendants' motion for summary judgment based on qualified immunity and denying his motion for summary judgment. Levier does not brief the wrongful-imprisonment and malicious-prosecution claims. Levier does not argue that the district court erred in granting summary judgment to the Town of Port Barre. These issues not briefed on appeal are waived. Fed. R. App. P. 28(a)(4); see Atwood v. Union Carbide Corp., 847 F.2d 278, 280 (5th Cir. 1988), cert. denied, 489 U.S. 1079 (1989).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

This Court reviews the grant of summary judgment de novo using the same criteria used by the district court in the first instance. King v. Chide, 974 F.2d 653, 655 (5th Cir.1992). Summary judgment is proper if, viewing the evidence in the light most favorable to the non-movant, the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S.Ct. 462 (1992); Fed. R. Civ. P. 56(c).

The first step in assessing a claim of qualified immunity is to ascertain whether the plaintiff has alleged the violation of a clearly established constitutional right. Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789, 1793, 114 L. Ed. 2d 277 (1991). The appellees concede that Levier has alleged a violation of clearly established constitutional rights insofar as his claim is based on the Fourth and Fourteenth Amendments.**

The second step is to "decide whether the defendant's conduct was objectively reasonable." Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993). Reasonableness is assessed in light of the legal rules clearly established at the time of the incident. Id.

** The Fourth Amendment provides an explicit textual source of constitutional protection concerning pretrial deprivations of liberty, thus such claims should be analyzed under the Fourth Amendment, not the more generalized notion of substantive due process under the Fourteenth Amendment. Albright v. Oliver, ___ U.S. ___, 114 S.Ct. 807, 813, 127 L.Ed.2d 114 (1994) (no substantive due process right to be free from criminal prosecution without probable cause).

Levier argues that the affidavit in support of his arrest warrant contained false information and that "no reasonable officer would have concluded that a warrant should issue under these circumstances." Levier argues that the arrest warrant was based on information the appellees knew to be false because "[t]he arrest warrant affidavit purports that each of the four statements that were obtained positively named plaintiff as the person involved in the described activities. Without a doubt, this is false information."

The arrest warrant affidavit states in pertinent part:

A witness named Lionell Earnestine [sic], Jr. said that some two hours before the explosion, he was told by Jerry Levier that he, Levier, was going to "blow the place up." The owner of the bar, Larry Smith, says that he saw Levier, in the bar about fifteen minutes before the explosion when he, Levier, came inside and got his cousin and left. Jimmy Gilbert and Kathy Gilbert say that shortly before the explosion they saw Levier going in back of the club which was the area of the explosion. Also, Virgil Benoit says that shortly after the explosion he saw Levier leaving in a truck from the area of the club.

Appellees admit that there were "clerical" errors in the affidavit and admit that neither Benoit or the Gilberts identified Levier as the person they saw. The affidavit correctly reflects the statements of Ernestine and Smith.

"[I]f an officer, in an affidavit supporting a warrant, makes a false statement knowingly and intentionally, or with reckless disregard for the truth, the false statements must be disregarded in determining whether the affidavit is sufficient to support a finding of probable cause." Hale v. Fish, 899 F.2d

390, 400 n.3 (5th Cir. 1990), citing Franks v. Delaware, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

"Probable cause is a defense to a § 1983 claim based on an alleged false arrest." Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990). The appellees are "entitled to qualified immunity unless, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue." Id. (internal quotations and citation omitted). "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." Malley v. Briggs, 475 U.S. 335, 344-45, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (internal citation omitted).

"Probable cause exists when the facts and circumstances known to the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed and the arrested person is the guilty person." United States v. Ramirez, 963 F.2d 693, 698 (5th Cir. 1992). This Court looks at the "`totality of the circumstances'" to determine whether an arrest warrant is supported by probable cause. Hale, 899 F.2d at 399, quoting Illinois v. Gates, 462 U.S. 213, 241, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Disregarding the misstatements as directed by Hale, 899 F.2d at 400 n.3., the affidavit reflects that Ernestine stated that Levier told him that he was "fixing to blow the place up" and that the owner of Smitty's, Larry Smith, stated that Levier escorted his sister and cousin out of the bar shortly before the

explosion. A reasonably competent officer could conclude that there was probable cause to believe Levier committed the bombing at Smitty's. The arrest warrant is supported by probable cause, thus the defendants' conduct in seeking the warrant was objectively reasonable.

Levier argues that the defendants' conduct was unreasonable because at the critical time -- when the warrant was requested -- the officers had conducted a "reckless investigation." Levier's main argument is that statements that support probable cause were not made to the arresting officers. This argument is without merit. "This court applies the 'collective knowledge doctrine' in determining probable cause for an arrest . . . [I]f an arresting officer has personal knowledge of some facts that do not, standing alone, establish probable cause but, 'when added to information known by other officers involved in the investigation, tips the balance in favor of the arrest,' he may make an arrest." Charles v. Smith, 894 F.2d 718, 724 (5th Cir. 1990) (citation omitted). "An affidavit may properly be based on hearsay, on fleeting observations, and on tips received from unnamed informants." Franks, 438 U.S. at 167.

The defendants acted reasonably and are entitled to qualified immunity. The district court properly granted summary judgment in favor of the officers.

Levier argues that the district court erred in denying his cross-motion for summary judgment on the issue of liability. Qualified immunity "is an immunity from suit rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526,

105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Because the defendants are entitled to qualified immunity, the district court properly dismissed Levier's claims.

The district court's judgment is AFFIRMED.