IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8889

Summary Calendar

KIRK WAYNE McBRIDE,

Plaintiff-Appellant,

v.

CRIME STOPPERS, ET AL.,

Defendants,

PARUS DUDLEY and CITY OF GARDEN RIDGE,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CV-216)

(November 14, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

I. PROCEDURAL POSTURE

Kirk Wayne McBride filed a complaint in Texas state court alleging violations of various state laws by two officials of the

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Comal County, Texas, Sheriff's Department; Crimestoppers; and the City of New Braunfels, Texas. In addition, McBride filed a third amended complaint which added claims pursuant to 42 U.S.C. § 1983, alleging deprivation of his Fourth Amendment rights by the City of Garden Ridge, Texas ("the City"), and Parus Dudley, the Chief of Police of Garden Ridge. A Texas state court entered final judgment in favor of all defendants on McBride's state law claims. The City of Garden Ridge and Parus removed the remaining constitutional claims to the United States District Court for the Western District of Texas.

A United States Magistrate Judge recommended that summary judgment be entered in favor of the City on grounds that McBride had failed to prove that the actions taken were pursuant to an official municipal policy or custom. In addition, the magistrate recommended that summary judgment be entered in favor of Dudley on grounds of qualified immunity. The district court accepted this recommendation and granted both Dudley's and the City's motions for summary judgment. Following denial of his motion for reconsideration, McBride filed a timely appeal to this court, proceeding *pro se*. We affirm.

II. FACTUAL BACKGROUND

On April 17, 1989, the Lone Star Ice House No. 54 located in Garden Ridge, Texas, was robbed. An employee on duty at the time, Kim Turner, reported the robbery and informed police that there were two robbers, a black male and an Hispanic male.

Turner told the police that the Hispanic male remained inside a black Chevrolet Camaro during the robbery and that she could not positively identify him. However, Turner told the police that the black male who accompanied her into the store during the robbery was approximately 25 years old, six feet tall, 190 pounds, with severe acne scars, dark black eyebrows, a scar over the right eye, and a heart-shaped tattoo on the left forearm with a name inscribed inside. A composite drawing was prepared and published in the New Braunfels Herald-Zeitung the next day.

On April 20, 1989, Dudley received information from the City of New Braunfel's Crimestoppers program that McBride and another individual, Jack A. Moore, had been identified as the robbers by an anonymous caller. Dudley also learned that McBride and Moore worked together at a local Jack-in-the-Box restaurant. The same day, Dudley and another officer went to the Jack-in-the-Box where McBride and Moore worked in an attempt to question them about the robbery. McBride was cooperative, and agreed to voluntarily accompany the officers to the Comal County Detention Center for further questioning. McBride was driven to the detention center in the front seat of the police car and upon arrival, answered the officers' questions freely. At the end of the questioning, Dudley drove McBride home.

On April 24, 1989, Turner identified McBride as the robber from an array of eight photographs of black males. On April 25, 1989, Dudley and another officer returned to the Jack-in-the-Box where McBride worked and asked him to return to the detention

center for further questioning. McBride again voluntarily agreed to submit to questioning and was again transported in the front seat of a police vehicle to the detention center. During questioning, McBride gave conflicting information regarding his whereabouts and admitted that he failed to keep his appointment with his parole officer on the day of the robbery. McBride agreed to voluntarily participate in a line-up. During the line-up, Turner again identified McBride as the robber. Following the line-up, Dudley drove McBride home.

On May 2, 1989, Turner provided a written statement about the robbery in which she described the robber as a black male, 25 to 30 years old, approximately six feet tall, medium build, with a heartshaped tattoo with a name inscribed on it on his *right* arm. Turner's written statement did not mention the acne scars, the scar over the right eye, or the dark black eyebrows mentioned in her original oral statement given to the police. The written statement also described the tattoo as being on the right arm, while the original statement asserted that the tattoo was on the robber's left arm. Based on Turner's descriptions of the robber, her positive identification of McBride in both the photo display and the line-up, the Crimestoppers anonymous tip, and McBride's statements, Dudley obtained an arrest warrant for McBride. McBride was arrested on a charge of aggravated robbery but the charges were later dropped. McBride then filed the instant suit.

III. STANDARD OF REVIEW

We note initially that briefs and papers of *pro se* litigants are to be construed more liberally than those filed by counsel. Securities and Exch. Comm'n v. AMX Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993). A district court's grant of summary judgment on the basis of qualified immunity is a question of law over which we have plenary review. Blackwell v. Barton, No. 91-4679, 1994 U.S. App. LEXIS 26836, at * 5 (5th Cir. Sept. 23, 1994); Brewer v. Wilkinson, 3 F.3d 816, 819-20 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994). Summary judgment is appropriate only if there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In our review of a grant of summary judgment, we view the evidence available to the district court in the light most favorable to McBride, the non-movant. Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1993).

IV. DISCUSSION

McBride alleges that the actions by Dudley and the City deprived him of his Fourth Amendment right to be free from unreasonable searches and seizures. Dudley responded to this allegation by asserting the defense of qualified immunity. The City responded to this allegation by asserting that McBride had failed to establish that the constitutional deprivation complained of was the result of some official policy, practice, or custom of the City. The district court agreed with these

contentions and granted summary judgment in favor of both Dudley and the City.

A. Qualified Immunity.

To determine whether a governmental official is entitled to qualified immunity, a court must first ascertain whether the plaintiff has asserted the violation of a clearly established constitutional right. Siegart v. Gilley, 111 S. Ct. 1789, 1793 (1991); Correa v. Fischer, 982 F.2d 931, 933 (5th Cir. 1993). Second, if the plaintiff has asserted the violation of a constitutional right, the court must then determine whether that right had been clearly established so that a reasonable official in the defendant's situation would have understood that his conduct violated that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987); Brewer, 3 F.3d at 820. Thus, in analyzing whether Dudley is entitled to qualified immunity, we must answer the threshold question of whether McBride has set forth a cognizable claim of constitutional deprivation.

An "unreasonable" seizure in violation of the Fourth Amendment requires, *a fortiori*, that a seizure occur. If a seizure does occur, it is "unreasonable" if it is without probable cause (in the case of a full scale arrest) or without reasonable suspicion (in the case of an investigative detention).

See Terry v. Ohio, 392 U.S. 1, 20-22 (1968) (holding that a brief investigative detention is constitutionally permissible absent probable cause so long as the officer has a reasonable suspicion that the detainee has engaged in criminal activity).

To determine whether a seizure has occurred, "a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." Florida v. Bostick, 501 U.S. 429, 439 (1991). The inquiry is therefore an objective one; subjective interpretations regarding one's freedom to terminate the encounter are irrelevant. If a reasonable person under the circumstances would feel free to terminate the encounter, there is no "seizure" within the meaning of the Fourth Amendment. We turn now to examine each of the three encounters between McBride and the police to determine whether a seizure occurred.

(1) The Encounters of April 20 and April 25, 1989.

The district court in the instant case determined that a seizure had occurred during the encounters between McBride and the police on April 20 and April 25, 1989. Specifically, the district court found that these two encounters constituted "investigatory stops" within the meaning of Terry v. Ohio, 392 U.S. 1 (1968).[1] We disagree. It is axiomatic that "[t]he Fourth

[1] The district court also concluded that these alleged investigatory stops were constitutionally valid because they were based upon a "reasonable suspicion" that McBride had engaged in

Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." Bostick, 501 U.S. at 439. "So long as a reasonable person would feel free `to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." Id. at 434 (quoting California v. Hodari D., 499 U.S. 621, 628 (1991)).

In this case, the uncontroverted evidence is that McBride voluntarily accompanied the police to the detention center on both April 20 and April 25. There is no evidence in the record that McBride ever asked to terminate the encounters. McBride admitted in his deposition that he was not forced to accompany the officers but subjectively felt, as a recent parolee, that he should accompany them and cooperate in order to clear his name. The only intimation of coercion comes from a statement in McBride's brief that he "was so intimated [sic] and overawed by the request [to accompany the officers to the detention center], that he was unable to exercise his free will." Such subjective beliefs, however, are not relevant to the analysis of whether a Fourth Amendment seizure has occurred. Bostick, 501 U.S. at 434-37.

Viewed in an objective light, the facts indicate that a reasonable, innocent person would have known, under the

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criminal activity. United States v. Sokolow, 490 U.S. 1, 7 (1989); Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

circumstances, that participation in these encounters was purely voluntary. See Bostick, 501 U.S. at 438 ("the `reasonable person' test presupposes an innocent person."). There is no evidence in the record which suggests that a reasonable person would have believed he was not free to terminate the questioning and walk away at any time. Thus, under the rule of Bostick, the encounters between McBride and the police on April 20 and 25 were not "seizures" within the meaning of the Fourth Amendment. Because the Fourth Amendment is not implicated by these consensual encounters, it follows that McBride cannot establish that he suffered any constitutional deprivation; absent a constitutional deprivation, the actions taken by Dudley are entitled to qualified immunity. Accordingly, the district court did not err in granting summary judgment to Dudley on grounds of qualified immunity.[2]

(2) The Encounter of May 2, 1989.

The encounter of May 2 undoubtedly constituted a full-scale arrest. Nonetheless, the district court held that the arrest was

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[2] We note that the deposition of McBride reveals that on April 20, 1989, the police searched a blue duffel bag belonging to McBride, taking a pocketknife and bandanna from therein. Such action unquestionably amounts to a "search" within the meaning of the Fourth Amendment. Whether this search was constitutionally reasonable because it was consensual or was supported by probable cause need not be answered, however, as McBride fails to raise this issue in his brief. See Cinel v. Connick, 15 F.3d 1338, 1345 (5th Cir. 1994) ("An appellant abandons all issues not raised and argued in its initial brief on appeal."), cert. denied, 1994 U.S. LEXIS 6287 (Oct. 3, 1994); Pan E. Exploration Co. v. Hufo Oils, 855 F.2d 1106, 1124 (5th Cir. 1988) (noting that an appellate court need not consider issues or arguments not raised in the appellant's brief).

constitutionally valid because it was supported by probable cause. We agree.

As of the date of arrest, the police were aware that the complainant had described the robber as a black male, approximately 25 to 30 years old, six feet tall, medium build, with acne scars, a scar over his right eye, dark eyebrows, and a heart-shaped tattoo with a name inscribed inside on one of his arms. The complainant had also positively identified McBride as the robber in both a photo array and a lineup. Furthermore, McBride had been identified as the robber through an anonymous tip provided to Crimestoppers. McBride provided the police with inconsistent stories regarding his whereabouts on the day of the robbery and had confessed to missing an appointment with his parole officer that day.

McBride admits in his brief that he is a black male and was, at the time of the robbery, 28 years old, 5 feet, eleven inches tall, 215 pounds, and has a heart-shaped tattoo, which contains a name inscribed inside, located on his arm. McBride focuses his argument on the fact that he has no acne scars, no scar over his right eye, and no dark eyebrows. These physical discrepancies, he argues, should have alerted the police that McBride was not the robber. Specifically, McBride contends that Dudley knew that there were discrepancies between the physical characteristics of McBride and the physical characteristics originally described to the police; therefore, securing an arrest warrant for McBride

with knowledge of such discrepancies constituted bad faith which rendered the arrest warrant invalid.

We cannot agree that knowledge of these physical discrepancies rendered the arrest warrant for McBride invalid. Under the totality of the information available to the police on May 2, we agree with the district court that sufficient probable cause existed to arrest McBride. McBride was of the same general age and appearance as the person whom the complainant originally identified as the robber. The complainant positively identified McBride during both a line-up and a photo array. An anonymous third person had identified McBride as the robber to Crimestoppers.[3] McBride had given inconsistent statements regarding his whereabouts on that day. Because these facts constitute probable cause, the arrest of McBride did not violate the Fourth Amendment. Since there was no constitutional deprivation, McBride has no cognizable claim under § 1983; thus, the district court did not err in determining that the actions by Dudley are entitled to qualified immunity.

B. Official Policy or Custom.

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[3] Contrary to McBride's contentions, the anonymous tip to Crimestoppers is a relevant factor in the determination of whether probable cause existed. While the anonymous tip in this case may not be sufficient, standing alone, to provide probable cause, it is nonetheless a brick in a wall of surrounding facts which together forms the requisite probable cause. See Illinois v. Gates, 462 U.S. 213 (1983) (adopting a "totality of the circumstances" test to determine the sufficiency of an informant's tip in establishing probable cause).

The district court entered summary judgment in favor of the City on grounds that McBride had failed to prove that the alleged constitutional deprivations were the result of an official policy or custom of the City. Monell v. Department of Social Serv., 436 U.S. 658, 694 (1978). Having analyzed McBride's allegations of constitutional deprivation and found them to be wholly without merit, we conclude that the issue of whether the actions complained of were taken pursuant to an official municipal custom or policy is moot. Thus, it was not error for the district court to grant summary judgment in favor of the City.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.