IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40451

IRENE SAGE, et al.,

Plaintiffs,

ROBERT DEVECCA,

Plaintiff-Appellant,

VERSUS

WAYNE F. MCELVEEN, et al.,

Defendants,

RANDY JOHNSON,

Defendant-Appellee,

Appeal from the United States District Court
for the Western District of Louisiana
(2:92-CV-01607)

(April 19, 1995)

Before HIGGINBOTHAM, SMITH, and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Robert Devecca appeals an unfavorable jury verdict in his civil rights action against police officer Randy Johnson. Devecca contends that the magistrate judge erred by refusing to instruct

[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the jury on malicious prosecution, by creating an "unbalanced charge" by improperly responding to the jury's questions, and by submitting an Allen charge to the potentially hung jury. Because we find no reversible error, we affirm.

I.

On August 23, 1991, detectives with the Calcasieu Parish Sheriff's Department, Narcotics Division, acting upon an informant's tip, staked out the Legends Lounge, a local nightclub. They believed that members of the band Common Knowledge, which was performing a late-night show, were smoking marihuana by a white van in the parking lot during their breaks. Surveillance from three police cars, however, turned up nothing but the seven band members leaving for the night.

Not wanting to let their work go for naught, the detectives followed the band, now in two vehicles (the white van and a Ford Mustang), to a local hotel. When the band members parked, the detectives confronted them, read them their rights, and asked to search the vehicles. The band members refused, and a long stand-off ensued.

Eventually Johnson, the narcotics supervisor in charge of the operation, arrived. Without acquiring consent or a warrant or seeking the assistance of a drug-detecting dog, he ordered a search of the vehicles. Apparently, he believed that he either had probable cause to search or was otherwise justified because of exigent circumstances. That search and a subsequent search of the

band members' hotel rooms turned up a small amount of marihuana and drug paraphernalia. All members of the band were arrested.

The band members successfully fought the charges in state court. They argued at a suppression hearing that the search of the vehicles was illegal, because the police lacked particularized probable cause that either vehicle contained contraband. The only witness for the prosecution was Johnson, whose testimony was contradictory at best. At worst, Johnson attempted to shape his testimony to make it appear that the police did have probable cause that related to both cars. He withered under cross-examination, however, and the state court suppressed the fruits of the search. The state, without admissible evidence of a crime, dropped all charges.

Several of the band members, including Robert Devecca, did not let the incident drop, however. They filed suits in federal court under 42 U.S.C. § 1983 (1988) against several of the officers, alleging violations of their civil rights. Only Devecca's suit, limited to Johnson, however, went to trial. After a two-day trial, the jury returned a verdict for Johnson.

II.

Devecca complains of several procedural errors. The facts necessary to evaluate these issues are discussed briefly below with the analysis of the legal principles.

A.

Devecca first contends that the magistrate judge abused his discretion by not instructing the jury on a charge of malicious prosecution.[1] Specifically, he argues that the court erred in finding that there was insufficient evidence to support his contention that detective Johnson's alleged perjured testimony at the suppression hearing constituted the continuation of the criminal prosecution.[2]

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[1] Both parties present the incorrect standard of review: abuse of discretion. As the court refused to submit the instruction because there was insufficient evidence, we review this ruling as we would consider a grant of a FED R. CIV. P. 50 motion for judgment as a matter of law. Cf. Martin v. Texaco, Inc., 726 F.2d 207, 212 (5th Cir. 1984) ("The jury should be instructed on a legal theory only if the evidence can justify such an instruction."); Foster v. Ford Motor Co., 621 F.2d 715, 717 (5th Cir. 1980) (same).

[2] The district court's full reasoning was as follows:

> For the record, we discussed this in the charge conference. I had originally intended to give a charge, which basically defined the elements of malicious prosecution, as far as the a constitutional tort as))insofar as relative to this case))malicious misrepresentation of the facts being one element, and the second element being the causation and continuation of the institution of criminal prosecution. I was concerned that there was no evidence that could support a finding on that by the jury, and I asked at the charge conference to point out to me evidence that would support a verdict on malicious prosecution grounds. At one point some testimony from the motion to suppress was cited. I felt that would not support a finding for malicious prosecution because the second element that, as I understood it, the motion to suppress resulted in termination of the criminal proceedings, not the continuation of them; and therefore, even if it is assumed that there was a malicious falsification of evidence at the motion to suppress hearing, the jury could not reasonably infer that resulted in a continuation of the institution per the prosecution.
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> The police report was reviewed. I won't go through each one, but in each case, I felt like it was inadequate evidence to support a reasonable inference that the remaining defendant was responsible for putting in the information in the report or that the information was material to the decision of the prosecutor in whether to continue or institute the prosecution.
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> Furthermore, we had discussed and I could not see any situation in this case where plaintiffs could not prevail))would not prevail on an unreasonable seizure or illegal arrest count, and, on the other hand, the jury could conclude that there was

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This circuit has long recognized a constitutional cause of action for malicious prosecution that may be asserted under § 1983.[3] The exact textual basis of this constitutional right, however, remains a mystery.[4] Moreover, we have struggled to define the exact elements necessary for a plaintiff to present a prima facie case.[5]

We need not and do not address those complicated issues here, however. Instead, we conclude that Johnson was absolutely immune from suit based upon his testimony at the suppression hearing.[6] In

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malicious prosecution. That being the case, I could not see how the plaintiff would be harmed by not having the malicious prosecution charge in there. For all those reasons, I refuse plaintiff's request to include this charge.

Because we affirm the court's decision on other grounds, we do not treat in detail these justifications, nor do we opine as to their correctness.

[3] See, e.g., Sanders v. English, 950 F.2d 1152, 1159 (5th Cir. 1992); Brummett v. Camble, 946 F.2d 1178, 1180 n.2 (5th Cir. 1991), cert. denied, 112 S. Ct. 2323 (1992); Thomas v. Kippermann, 846 F.2d 1009, 1011 (5th Cir. 1988); Wheeler v. Cosden Oil & Chem. Co., 734 F.3d 254, 257-60 (5th Cir.), modified, 744 F.2d 1131 (1984). But see Johnson v. Louisiana Dep't of Agric., 18 F.3d 318, 320 (5th Cir. 1994) (questioning whether such tort exists for violation of First Amendment rights); Brummett, 946 F.2d at 1181 n.2 (discussing how early Fifth Circuit caselaw did not recognize a constitutional cause of action for torts of abuse of process such as malicious prosecution).

[4] See Wheeler, 734 F.2d at 260 (holding that the constitutional basis is the implied right to be charged only upon a finding of probable cause); Thomas, 846 F.2d at 1011 (holding that the basis is the Fourth and Fourteenth Amendments); see also Albright v. Oliver, 114 S. Ct. 807, 813-14 (1994) (holding that the substantive due process component of the Fourteenth Amendment is not the source of the right) (plurality opinion) (five Justices writing separate opinions).

[5] See, e.g, Johnson, 18 F.3d 320 (suggesting that, if constitutional tort exists, the elements include deprivation of a federal right and elements of common law tort); Hand v. Gary, 838 F.2d 1420, 1424-27 (5th Cir. 1988) (discussing principles established by circuit's malicious prosecution caselaw).

[6] Devecca's brief discusses only the testimony at the suppression hearing. Because Devecca ordered the transcript only from that hearing and not from the trial, we are unable to determine whether he also raised questions at trial relating to the filing the police report, presenting a criminal complaint, or appearing at a pre-trial probable cause hearing. Since Devecca bore the onus of ordering the transcript if he deemed it necessary for his

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Moore v. McDonald, 30 F.3d 616, 620 (5th Cir. 1994), we held that a police officer has absolute immunity from § 1983 perjury claims when testifying at adversarial hearings such as pre-trial suppression hearings.[7] The basis for these holdings is Briscoe v. LaHue, 460 U.S. 325 (1983), holding that the passage of § 1983 did not abrogated the common law immunity of witnesses at trial to be absolutely immune from liability arising from their testimony. The Court found that the common law in 1871 (the date of § 1983's enactment) absolutely protected witnesses from suit based upon that testimony, so the Court interpreted the statute to apply the same rule today. Id. at 330-34.

Briscoe, however, left open the question of whether such immunity applies to pre-trial hearings. See id. at 329 n.5. Accordingly, Moore explicitly extended the recognition of the common-law immunity of Briscoe to adversarial pre-trial hearings such as suppression hearings. As that immunity bars suit for malicious prosecution based upon trial testimony, see Briscoe, 460 U.S. at 331-32 (holding that common law immunity barred suits even for malicious and false statements), it necessarily bars the same suit based upon testimony at a suppression hearing.

We do note that dictum in Moore, 955 F.2d at 620, suggests a distinction between complaining and non-complaining witnesses in

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appeal, see FED. R. APP. P. 10(b), we do not treat the trial testimony.

[7] See also Curtis v. Bembenek, No. 92-3434, 1995 U.S. App. LEXIS 3672, at *11-12 (7th Cir. Feb. 23, 1995) (holding that witness who testifies in adversarial preliminary hearing is absolutely immune); Holt v. Castaneda, 832 F.2d 123, 125-26 (9th Cir. 1987) (same), cert. denied, 485 U.S. 979 (1988).

determining the question of immunity. This distinction is derived from Malley v. Briggs, 475 U.S. 335, 340-41 (1986), which found that "[i]n 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." Other circuits have applied this distinction to trump the potential immunity of witnesses at pre-trial probable cause hearings.[8]

That distinction, whatever its reach, is not applicable here. As this circuit recognizes no immunity for witnesses at non-adversarial probable-cause hearings, such caselaw is of little relevance to us. See Wheeler, 734 F.2d at 254. Moreover, the Second Circuit, which does admit to the rule, does not apply it to adversarial pre-trial hearings. See Daloia v. Rose, 849 F.2d 74, 76 (2d Cir.), cert. denied, 488 U.S. 898 (1988). We reiterate Moore's holding that a witness who testifies at an adversarial hearing is absolutely immune from suit based upon that testimony.

Thus, regardless of the reasoning of the district court in denying the malicious prosecution claim, we find that such a claim here was barred as a matter of law. Therefore, the court did not engage in reversible error by refusing to give the requested charge.

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[8] See Anthony v. Baker, 955 F.2d 1395, 1399-1402 (10th Cir. 1992) (finding no immunity for claiming witness who makes knowingly false statements at grand jury proceeding); White v. Frank, 855 F.2d 956, 958-961 (2d Cir. 1988) (same). But see Kulwicki v. Dawson, 969 F.2d 1454, 1467 n. 16 (3d Cir. 1992) (refusing to read Malley to override Briscoe) (dictum).

B.

Devecca next argues that the court abused its discretion in responding to a jury question. He contends that the court's supplemental instruction directed the jury to disregard the search as a factual matter, thus creating an "unbalanced charge."

A trial court retains broad discretion to supplement its instructions in response to questions from the jury. United States v. Duvall, 846 F.2d 966, 977 (5th Cir. 1988). "In supplementing his instructions, however, the judge has a duty to clear away the confusion and difficulty over an issue that the jury expresses." Id. We review such a supplemental instruction as a whole and in light of the instructions already given. Id.

Under our standard of review and the circumstances, Devecca's argument fails. The deprivation of a federal right of which Devecca complained in his § 1983 action was an unconstitutional "seizure," that is, arrest. This issue, as well as the jury's role as "fact finders," was explained to the jury in the original instruction.

During deliberations, however, the jury had questions about the legality of the search of the car. It initially sent a note to the court (note 2), inquiring why the motion to suppress was granted. The court informed the jury that the question of the suppression was not an issue for it to decide, meaning that it should not consider that legal issue. Later, the jury asked for a transcript of the motion to suppress (note 5); the transcript was provided without objection.

Next followed the question and charge of which Devecca complains (note 6). The full dialog is as follows:

> Question: "Could Devecca have signed the voluntary search form for the Mustang at Chateau Charles on 8/24/91?"
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> Court: "Devecca's only claim of a constitutional violation is that he was arrested unconstitutionally. He has made no claim that the search of the Mustang violated his federal constitutional rights. Since he was only a passenger he had no authority to consent or object to the search of the Mustang. Therefore, whether or no he could have signed a voluntary search form for the Mustang is not relevant to your deliberations."

The jury, still not satisfied, sent another note (note 7), which asked: "If there was an illegal search of the Mustang would it have any bearing on whether or not Devecca's constitutional rights were violated?" The court responded: "No, the search of the vehicle is not at issue. The issue is the constitutionality of the arrest."

One final significant question was sent (note 9). The jury asked: "Can the investigation, search and evidence leading up to the arrest be considered in determining whether Devecca's constitutional rights were violated?" The court then reinstructed the jury, as the original instructions had done in general terms, that "[y]ou may consider all the circumstances including the investigation and evidence leading up to the arrest."

These supplemental instructions, read together with the original instructions, do not support the argument that the court was telling the jury to disregard the facts surrounding the search. The judge was directing the jury to consider the legal issue before it, i.e., the arrest, without limiting its review of the facts

surrounding the arrest. Hence, the court did not abuse its discretion in responding to the jury's inquiries.

C.

Devecca argues that the court abused its discretion by not granting a mistrial when the jury informed the court that it was unable to reach a decision. The court sent an Allen charge to the jury, which continued to deliberate and then reached a verdict. See Allen v. United States, 164 U.S. 492 (1896). The subsequent charge was generally the Fifth Circuit Pattern Allen charge, a charge we have repeatedly upheld. See, e.g., United States v. Nguyen, 28 F.3d 477, 484 (5th Cir. 1994); United States v. Gordon, 780 F.2d 1165, 1177 (5th Cir. 1986). We also have stated that the trial court is "vested with broad discretion to evaluate whether an Allen charge is likely to coerce a jury into returning a verdict it would not otherwise return." Gordon, 780 F.2d at 1177. The simple fact that the jury volunteers its division is not ground for precluding a court from giving an otherwise valid Allen charge. Nguyen, 28 F.3d at 484 (citing Sanders v. United States, 415 F.2d 621, 631-32 (5th Cir. 1969), cert. denied, 397 U.S. 976 (1970)).

Here, the jury's deliberations were relatively brief. The trial lasted two days, with the jury deliberating for four hours on the last day of trial. The next day, it informed the court of its difficulty in reaching a decision, after it had deliberated for a "couple of hours." The judge decided to give the Allen charge. Under these facts, and Devecca has provided no others, the decision

was not an abuse of discretion, as no evidence supports the contention that the jury was coerced into returning a verdict.

AFFIRMED.