IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40525
Summary Calendar

Alfreda Lee Sampson,

Plaintiff/Appellee,

versus

Regional Controlled Substance
Apprehension Program, et al.,

Defendants,

Doris Board,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas
(3:93-CV-68)

(February 13, 1995)

Before JOHNSON, BARKSDALE, and PARKER, Circuit Judges.[1]

JOHNSON, Circuit Judge:

Plaintiff filed this section 1983[2] action against a law enforcement agency and individual officers alleging that they searched her home based on an invalid search warrant and executed that warrant in an unreasonable way. All of the individual defendants except one filed motions for summary judgment on the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[2] 42 U.S.C. § 1983.

basis of qualified immunity which the district court denied. Defendant Agent Board now appeals the district court's determination and we AFFIRM.

I.

On May 20, Commander Sims obtained a search warrant to search the apartment of Kiethie Minter, a suspected drug dealer. This warrant was based on information from a confidential informant who told Sims that he witnessed Minter selling drugs from his apartment. Further, the informant pointed to the location, stating that it was "the apartment under the gabled roof." Based on Sims' personal observations, Sims believed that there was only one apartment under the gabled roof. Hence, the search warrant described the location to be searched as follows:

> The unit in question is further described as being the only unit on the front of the first building facing Cherry St. which as [sic] a gabled front porch.

R. Vol. 2 at 409.

At about 8:20 p.m. that evening, officers from the Regional Controlled Substance Apprehension Program ("RCSAP") executed this warrant. The lead officer on the scene was Officer Samply.[3] Also participating in the initial entry were Agent Davis Board from the Texas Alcoholic Beverage Commission and three members of the Paris Police Department.

When the officers approached to execute the warrant, they discovered that there were, in fact, two apartments under the

[3] Although Commander Sims was in charge of the operation that evening, he was in a vehicle across the street and did not participate in the initial entry into the apartment.

gabled roof. Hearing noise behind one of the doors,[4] the officers guessed that that was the correct apartment and busted in the door.

Unfortunately, the officers' guess was incorrect. Residing in the apartment was forty-six year-old Alfreda Sampson, the plaintiff in this action. Moreover, according to Sampson, the officers, who were wearing masks, failed to adequately identify themselves, failed to give her time to respond before breaking down her door and failed to timely release her after discovering that they had the wrong apartment. Further, Sampson contend that Officer Board pushed her to the floor, placed a gun to her neck, cocked the gun and forced her to remain in a spread-eagle position until the other officers completed their search.

Sampson brought the instant action against the RCSAP and all of the officers involved alleging two causes of action under section 1983 for an unreasonable search and seizure and one under state law for intentional infliction of emotional distress. She claimed that the warrant was invalid because the description given in it equally fit both her apartment and Kiethie Minter's apartment and she alleged that the search was carried out in an unreasonable manner.

All of the individual defendants, except Officer Samply, filed motions for summary judgment based on qualified immunity. The district court denied these motions, however, and Agent Board

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[4] Apparently, Commander Sims had mentioned to the officers that he believed that people were inside the apartment to be searched.

timely appealed that judgment.[5]

II.

A. Standard of Review

We review the district court's grant of a summary judgment motion de novo. *See Davis v. Illinois C. R. Co.*, 921 F.2d 616, 617-18 (5th Cir. 1991). A summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

B. Discussion

Qualified immunity protects a governmental official performing a discretionary duty from civil liability for her actions so long as her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). Making qualified immunity determinations requires a two-step analysis. *Rankin v. Klevenhagen*, 5 F.3d 103, 105 (5th Cir. 1993). First, this Court must determine if the plaintiff has stated a violation of a clearly established constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 1793 (1991); *see also Salas v. Carpenter*, 980 F.2d 299, 305-06 (5th Cir. 1992). If so, the Court then must determine if the officer's conduct was objectively reasonable. *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993).

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[5] All other defendants have settled.

The first prong of this test is easily met in this case. It is undisputed that the police herein searched the wrong house and the right to be free from a search of the wrong place, even when executed pursuant to a warrant, is secured by the Fourth Amendment. *Navarro v. Barthel*, 952 F.2d 331, 333 (9th Cir. 1991). The issue in this case, then, is whether the officers' actions were objectively reasonable.

Instructive as to the police officers' duties in this case is the Supreme Court's opinion in *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 1016 (1987). In that case, the police, believing that there was only one apartment on the third floor of the building to be searched, secured a warrant to search the "third floor apartment" of a suspected drug dealer named McWebb. *Id.* at 1014-15. In fact, there were two apartments on the third floor. Only after the police had begun to search the wrong apartment, wherein they found illegal drugs, did the police discover their error. *Id.* 1015. As soon as the police recognized their error, they discontinued the search of the wrong apartment. *Id.*

In resolving whether to exclude the evidence of the drugs found in the wrong apartment, the Supreme Court determined that the constitutionality of the police conduct must be judged in light of the information available to them at the time they acted. *Id.* at 1017. As to the *issuance* of the warrant, the Court found that "if the officers had known, or even if they should have known, that there were two separate dwelling units on

the third floor," the warrant would have had to exclude the unimplicated apartment from the scope of the warrant to be valid. *Id.* However, the Court upheld the validity of the warrant because it found that, after a reasonable investigation, the officer who obtained the warrant reasonably concluded that there was only one apartment on the third floor. *Id.* at 1015.

The Supreme Court then addressed the *execution* of the warrant. In so doing, the Court made it clear that

> [i]f the officers had known, or should have known, that the third floor contained two apartments *before* they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment.

Id. at 1018. However, the Court found that, based on the information available to the officers as the search proceeded, the officers' mistake in not realizing that there were two apartments until after they had begun to search the wrong apartment was reasonable. Also, the Court emphasized that the officers recognized that they had to discontinue the search once they were "put on notice of the *risk* that they might be in a unit erroneously included in the terms of the warrant." *Id.* (emphasis added). Accordingly, the Supreme Court upheld the validity of the execution of the search because it found the officers' actions to be reasonable.

In the instant case, Agent Board did not participate in obtaining the warrant. However, she did participate in the

execution of the warrant.[6] Moreover, her conduct contrasts sharply with the conduct of the officers who executed the warrant in the *Garrison* case. In this case, Agent Board admits in her deposition that she knew *before* they entered Sampson's apartment that the warrant described only one apartment but that there were, in fact, two. Even so, the officers on the scene guessed which apartment was correct and proceeded.[7]

The district court found that these actions were not objectively unreasonable because they did not comport with the

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[6] This Court faced a similar situation in *Richardson v. Oldham*, 12 F.3d 1373 (5th Cir. 1994). In that case, a police officer obtained a warrant to search a particular house not knowing that two houses fit the description provided in the warrant. Unfortunately, the wrong house was searched. Even so, this Court upheld the qualified immunity of the police officer who obtained the warrant. *Id.* at 1381. Following *Garrison*, this Court recognized that the reasonableness of the officer's actions is to be determined in light of the information available to the officers at the time they acted. Thus, this Court cautioned that if at the time the officer obtained the warrant he "knew or should have known that there were multiple houses . . . fitting the description given in the warrant, he would have been obligated to specify in the warrant which house was to be searched, and the search in this case would have been unlawful." *Id.* However, since the letters which differentiated the houses were not visible from the street, this Court found the officer's actions to be reasonable. *Id.*

This case is distinguishable from the instant case, though, because it focused on the issuance of the warrant and not the execution of the warrant. Nothing in the *Richardson* case suggests that before the execution of the search, or at any time during the search, the police realized, or should have realized, that multiple dwellings fit the description in the warrant. Accordingly, the *Richardson* case does not comment on the reasonableness of the officer's actions in executing the warrant.

[7] This is not a case wherein the police executing the warrant knew the correct place to search but there was a technical error in the warrant. In this case, the police were surprised to be confronted with two doors instead of one and were unsure which was the correct door.

standards set out in *Garrison*, 107 S.Ct. at 1017-18. Since both Agent Board and Officer Samply admit that they knew beforehand of the overbreadth of the warrant, they were certainly on notice of the risk that they might search the wrong residence. Nevertheless, they did not discontinue the search as did the officers in *Garrison*. Instead, without making any attempt to more definitively ascertain which was the correct apartment, the officers busted into Sampson's apartment. We agree that this is contrary to the rule of *Garrison* and thus that Agent Board's motion for summary judgment was properly denied.

III.

For the reasons stated above, the district court's denial of Agent Board's motion for summary judgment based on qualified immunity is AFFIRMED.