IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50332
Summary Calendar

Harold A. Krueger,

Plaintiff/Appellant,

versus

Jack Bremer, Sheriff of Comal County, et al.,

Defendant/Appellee.

Appeal from the United States District Court
For the Western District of Texas
(SA-92-CA-223)

(February 8, 1994)

Before JOHNSON, JOLLY, and DAVIS, Circuit Judges.[1]

JOHNSON, Circuit Judge:

Plaintiff brought this section 1983[2] action against sheriff, sheriff's surety and county alleging wrongful arrest and malicious prosecution on charges of impersonating a public official. The district court granted the defendants motion for summary judgment and Krueger appeals. We affirm in part, reverse in part and remand.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

I. FACTS AND PROCEDURAL HISTORY

In October of 1988, Harold Krueger was hired by (then) Comal County Sheriff Fellers as a reserve law enforcement officer. Krueger was also employed as a jailor for Comal County. On January 1, 1989, defendant Jack Bremer took office as Comal County Sheriff. Citing an unwritten policy against dual commissions, Sheriff Bremer terminated Krueger's reserve officer status. Later, Krueger was also terminated from his position as a county jailor.

On July 1, 1991, Krueger was at his apartment in New Braunfels when he discovered a trespasser on the roof of the business where his apartment was located. Krueger held the trespasser in custody with a shotgun, hand-cuffed the trespasser, identified himself as a police officer and told the trespasser that he was under arrest. Comal County deputy sheriffs arrived and took the trespasser into custody.

On July 5th, 1991, a complaint was issued against Krueger for impersonating a public servant and the county magistrate issued a capias for his arrest. On July 10, aware that he had a problem with the Comal County Sheriff's Department, Krueger, along with his father and his attorney, traveled to Schulenberg to discuss Krueger's employment with the Schulenberg chief of police, Lee Hoffman.[3] After having been informed that there was a warrant for

[3] No one disputes that at all relevant times Krueger was licensed by TCLEOSE (Texas Commission on Law Enforcement Officer Standards and Education) to be a police officer. The pivotal issue, therefore, as to whether Krueger was a police officer on July 1, 1991 is whether Krueger was commissioned (i.e. employed) as a police officer on July 1, 1991. *See* Tex. Admin. Code § 211.1 (supp. 1994). In the early part of 1991, Krueger had been employed

Krueger's arrest, Hoffman executed a TCLEOSE form indicating that Krueger had been reinstated as a police officer for the City of Schulenberg as of June 10, 1991.[4] Krueger's attorney then filed these forms with TCLEOSE on that same day, July 10, 1991.[5]

The next morning, on July 11, 1991, Comal County sheriff's officers arrested Krueger. Thereafter, despite being made aware of the Schulenberg recommissioning, a grand jury indicted Krueger on the charge of impersonating a public official. At trial in December of 1991, Krueger was acquitted.

Krueger brought the instant section 1983 action against Sheriff Bremer and Comal County contending that Sheriff Bremer[6] was aware of Krueger's status as a commissioned police officer yet maliciously directed the arrest and prosecution of Krueger. In addition to his constitutional claims under section 1983, Krueger also asserted state law claims for false arrest, malicious

---

as a police officer for the city of Schulenberg. However, on July 5th, 1991, TCLEOSE records reflected that that service ended on May 24, 1991.

[4] In response to a call from the Comal County's District Attorney's office, Hoffman also sent a letter explaining that Krueger had been reinstated because Krueger had testified before a grand jury on June 20, 1991. This letter listed Krueger's dates of employment as March 8, 1991 to May 24, 1991 and June 10, 1991 to present. However, the letter also stated that the only time that Krueger was employed by the City of Schulenberg between June 10, 1991 and July 16, 1991 was on the day of his grand jury testimony on June 20, 1991.

[5] Pursuant to Tex. Admin. Code § 211.11(h), an agency that appoints an individual as a police officer who is previously licensed must notify the commission of the appointment within 30 days of the appointment.

[6] Krueger also sued Western Surety Company as the surety for Bremer.

prosecution and negligence against Bremer. Pertinent to this appeal, the defendants moved for summary judgment as to Krueger's section 1983 claims on the basis of qualified immunity and the absence of an unconstitutional policy. The district court granted this motion, and further, rendered summary judgment *sua sponte* as to Krueger's state law claims. Krueger now appeals.

II. DISCUSSION

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. Qualified Immunity

A government official performing a discretionary function is shielded from civil liability for his actions so long as his 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). This standard protects the official as long as his "actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038 (1987). Making qualified immunity determinations requires a two-step analysis. First, we must determine if the plaintiff has stated a violation of rights

secured by the constitution and then we examine the objective reasonableness of the defendant official's actions. *Salas v. Carpenter*, 980 F.2d 299, 305-06 (5th Cir. 1992). In the instant case, however, there is no need to assess the reasonableness of Sheriff Bremer's actions because he did not violate Krueger's constitutional rights.

C. The Arrest and the Prosecution

The key to this case is the existence of probable cause which is a defense to false arrest, *Pfannstiel v. Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990), and an essential element of malicious prosecution. *Pete v. Metcalfe*, 8 F.3d 214, 219 (5th Cir. 1993). "Probable cause exists `when the facts and circumstances within the arresting officer's personal knowledge, or of which he has reasonably trustworthy information, are sufficient to occasion a person of reasonable prudence to believe an offense has been committed.'" *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir.), *cert. denied*, 109 S.Ct. 66 (1988), quoting *United States v. Forrest*, 620 F.2d 446, 453 (5th Cir. 1980). The district court found that probable cause did exist, and we agree.

As to the arrest on charges of impersonating a police officer,[7] it is undisputed that Krueger claimed to be a police officer on July 1, 1991 when he confronted the trespasser. It is also undisputed that, on July 5, 1991, when the warrant for

[7] Under Texas law, a person impersonates a public officer if there is a false assumption or pretension by the person that he is a public servant and overt action in that capacity. Tex. Penal Code Ann. § 37.11(a).

Krueger's arrest was issued, TCLEOSE records indicated that Krueger was not commissioned as a police officer.[8] Accordingly, there was probable cause to support the issuance of the warrant for Krueger's arrest. As the arrest was made on the basis of this properly supported warrant, it simply was not a false arrest. *Thomas v. Sams*, 734 F.2d 185, 191 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3476 (1985).[9]

As to the prosecution, Krueger contends that once the information about the filing of the July 10, 1991 TCLEOSE form, which stated that Krueger had been reinstated as a Schulenberg police officer as of June 10, 1991, became known, the prosecution should have ceased. The continuation of that prosecution, Krueger alleges, is attributable to the malicious intent of Sheriff Bremer.

Sheriff Bremer counters, though, by relating that the facts about the July 10, 1991 recommissioning were made known to the district attorney, William Gibbons. Gibbons testified in his deposition that he was fully aware of the July 10, 1991 recommissioning. Even so, Gibbons believed that this information was actually inculpatory and not exculpatory. This is because it was obtained only after the warrant was issued and only because Krueger, his attorney and his father travelled to Schulenberg and

---

[8] In fact, these records indicated that Krueger's employment with the City of Schulenberg had ended on May 24, 1991.

[9] Krueger counts on the July 10, 1991, commission executed by Chief Hoffman of Schulenberg to establish that at the time of the arrest on July 11, probable cause no longer existed. However, Krueger failed to present summary judgment evidence that the Comal County Sheriff's department was made aware of this action prior to the arrest.

pressured Chief Hoffman into executing the document. Accordingly, Gibbons decided to continue the prosecution. Moreover, this information was presented to the grand jury and the grand jury returned an indictment.

Under our precedent, the actions of these independent intermediaries would break the chain of causation and insulate Sheriff Bremer's actions even if they were malicious. *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 361 (1983). This chain of causation is broken, though, only if the sheriff presented all the facts to the independent intermediary and there was no misdirection or withholding of any relevant information by the sheriff. *Hand v. Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988).

In light of this, Krueger has attempted to make out his malicious prosecution claim by alleging that Sheriff Bremer did not provide Gibbons or the grand jury with all of the documents from the investigation and thus the grand jury proceedings and the resulting indictment were tainted. The district court found that Krueger had raised doubt as to whether certain documents in the Sheriff Department's file were provided to Gibbons. However, after reviewing those documents, the district court concluded that there was nothing exculpatory in those documents. We agree. The critical information was the filing of the TCLEOSE form on July 10. That information was made known to the district attorney and the grand jury and nothing in the documents allegedly not provided materially adds to the exculpatory force of Krueger's evidence.

Accordingly, we find that the action of the district attorney and the grand jury were not tainted and thus were sufficient to break the chain of causation from Sheriff Bremer's actions even if they were malicious. For that reason, Krueger's claim of malicious prosecution against Bremer fails.

D. County liability

The Supreme Court has held that a government entity can only be held liable under section 1983 if the entity itself causes the constitutional violation in issue. *Monell v. Dept. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38 (1978). Vicarious liability is not a basis for recovery. *Id.* Instead, the entity is only liable when the execution of its policy or custom inflicted the injury. *Id.*

In this case, the action against the county fails because Krueger has not suffered a constitutional injury. Probable cause supported both the arrest and the prosecution. Moreover, even if the prosecution was not supported by probable cause, the actions of the independent intermediaries broke the chain of causation. Finally, Krueger has submitted no evidence of an unconstitutional policy or custom on the part of the county.

E. State Law Claims

In its motion for summary judgment, the defendants asserted that Krueger's state law claims for false arrest, malicious prosecution and negligence should be dismissed for lack of jurisdiction upon the dismissal of the federal claims. The magistrate judge, however, retained jurisdiction, citing *United*

Mine Workers v. Gibbs, 383 U.S. 727, 86 S.Ct. 1130 (1966), and recommended that summary judgment be granted *sua sponte* on these claims in favor of the defendants. Krueger contends that this was error and we agree.

A district court may grant a motion for summary judgment *sua sponte* provided it gives proper notice to the adverse party. *Judwin Properties, Inc. v. United States Fire Ins. Co.*, 973 F.2d 432, 436 (5th Cir. 1992); Fed. R. Civ. P. 56(c). Thus, a district court may only grant summary judgment *sua sponte* if it grants at least ten days notice in advance of doing so. *NL Industries, Inc. v. GHR Energy Corp.*, 940 F.2d 957, 965 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 873 (1992). In this case, the magistrate judge did not give any notice, much less ten days, that it intended to grant summary judgment *sua sponte* as to the state law claims.

The defendants attempt to rehabilitate this lack by pointing to the delay between the magistrate judge's recommendation and the district court's adoption of that recommendation. The magistrate judge's Memorandum and Recommendation informed the parties of their right to object within ten days. Further, counsel for Krueger moved to extend that time and, in fact, thirty-one days passed before the district court adopted the magistrate judge's recommendation. Accordingly, the defendants argue that this period afforded Krueger adequate notice and opportunity to respond.

While the defendants present a persuasive argument, we are bound by this Court's decision in *Balogun v. I.N.S.*, 9 F.3d 347 (5th Cir. 1993). In that case, as in this case, this Court found

that the magistrate judge failed to give the adverse party any notice that he was considering recommending summary judgment against that party. Although the adverse party did file objections to the magistrate judge's recommendations, and even though twenty-two days passed before the district court adopted that recommendation, this Court held that the district court erred in adopting the magistrate judge's recommendation because the *magistrate judge* had failed to give the adverse party adequate notice. *Id.* at 352. In the same way, we conclude that the district court herein erred in adopting the magistrate judge's recommendation as to the state law claims.

III. CONCLUSION

The district court erred in granting summary judgment *sua sponte* in favor of the defendants as to the state law claims because adequate notice of that intention was not given. Accordingly, we REVERSE and REMAND as to the state law claims. However, the judgment of the district court is in all other respects AFFIRMED.