UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50469
Summary Calendar

PETE MONTOYA, JR.,

Plaintiff-Appellee,

versus

GUY TAYLOR and MARBLE FALLS POLICE DEPARTMENT,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas
(A-93-CA-756)

(January 3, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellee Pete Montoya, Jr. (Montoya) brought this section 1983 action seeking damages against defendants-appellants Guy Taylor (Taylor) and the Marble Falls Police Department (the Department) for allegedly violating his Fourth and Fourteenth Amendment rights by arresting him without probable cause. Taylor

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and the Department moved for summary judgment, claiming they were entitled to qualified immunity. The district court denied the motion, and defendants brought this interlocutory appeal. We reverse the judgment as to Taylor and dismiss the Department's appeal.

Facts and Proceedings Below

At the time of the events forming the basis of this suit, Montoya was an assistant store manager at the H.E.B. supermarket in Marble Falls, Texas. On December 12, 1992, based on a tip from store employee Travis Long (Long) and another employee, H.E.B. supervisors David Crail (Crail) and Marvin Albright (Albright) discovered several employees smoking marihuana behind the store during a work break. Montoya was not part of this group. Crail and Albright confronted the employees, who admitted to smoking marihuana and handed Crail a bag containing a substance that Crail believed to be marihuana. Crail took the bag and called the police.

Taylor was the investigator assigned to the case. Crail and Albright told him what they had witnessed and also advised him that Montoya had reportedly threatened Long not to reveal Montoya's knowledge of or involvement in prior similar incidents. In his affidavit submitted in support of the motion for summary judgment, Taylor recited the following facts:

> "I then spoke with **TRAVIS LONG**, who told me that he had caught the four people (that were caught by **CRAIL** and **ALBRIGHT**) smoking pot on earlier occasions and had passed that information on to **DAVID CRAIL** and **LISA JARRELL**, two of his supervisors. **LONG** also told me that he had seen **MONTOYA** coming from the back of the store a couple of times with the smokers. **LONG** went on to say that after

> **CRAIL** busted those four other guys, **MONTOYA** told **LONG** that **CRAIL** wanted to talk to **LONG**, and that **MONTOYA** further stated that **MONTOYA** had already told **CRAIL** that **MONTOYA** didn't know anything about the smoking incidents. **LONG** told me that **LONG** knew this was not true and after **LONG** met with **CRAIL**, **MONTOYA** began to pressure **LONG** with questions about what **LONG** told **CRAIL**. **LONG** told me that **LONG** wouldn't talk to **MONTOYA**, and **MONTOYA** then threatened that if **MONTOYA** heard that **LONG** was talking to the police or management, that **MONTOYA** would tell management that **LONG** had been stealing from the store. **LONG** went on to say that on the following day, **LONG** told **DAVID CRAIL** about the incident. **LONG** also said that later that same evening, while **LONG** was in the cooler, **MONTOYA** threatened to `mess him up' if he talked to anybody, claiming they `would stand together or fall together.' **LONG** said he asked **MONTOYA** what **MONTOYA** meant and **MONTOYA** responded: `You figure it out.'"

Taylor's affidavit also shows that he spoke with Long's mother, Mary Long, who told him that an anonymous male caller had phoned her in the early morning hours of December 14, 1992 and said that her son "wouldn't make it till next Christmas" if he told anybody about what had happened at the store. Long told Taylor that the call was placed around the time Montoya would have been getting off from work. Written statements from Long and his mother, each dated December 14, 1992, which Taylor attached to his own affidavit, corroborate Taylor's version of events.

On December 17, 1992, Long swore out a complaint against Montoya for the crime of retaliation. Under Texas law, it is a crime to intentionally or knowingly threaten another

> "(1) in retaliation for or on account of the service of another as a public servant, witness, prospective witness, informant, or a person who has reported or who the actor knows intends to report the occurrence of a crime; . . ." TEX. PENAL CODE § 36.06(a)(1).

Based on this complaint, the Longs' statements, the results of his investigation, and his own affidavit for arrest warrant of December

17, 1992, in which he stated, *inter alia*, that he had good reason to believe and believed that Montoya had committed retaliation "based upon . . . information" that "Montoya made threats of physical harm towards Travis Long and warned him against speaking with officers investigating the case," Taylor obtained an arrest warrant for Montoya for the crime of retaliation on December 17, 1992. The Llano County grand jury, however, did not return an indictment against Montoya on the basis of this complaint, and the charges were dropped.

Subsequently, Montoya filed this civil action pursuant to 42 U.S.C. § 1983 against Taylor and the Department asserting violations of his Fourth and Fourteenth Amendment rights. He claimed that the arrest warrant was not supported by probable cause and that Taylor's allegedly inadequate investigation "show[s] a policy or custom of the Marble Falls Police Department to ignore the requirement of probable cause prior to requesting an arrest warrant." He sought compensatory and punitive damages and attorneys' fees.

Taylor and the Department moved for summary judgment on the basis of qualified immunity. Montoya's response to the motion was supported only by his attorney's affidavit attesting that the grand jury refused to indict Montoya on the retaliation charge. The magistrate judge found that material issues of fact remained as to whether there was probable cause to request an arrest warrant, whether Taylor's duties in securing the arrest warrant were discretionary, and whether the Department maintained a custom or policy of ignoring the probable cause requirement in obtaining

arrest warrants. The district court adopted the magistrate judge's report and denied summary judgment. Taylor and the Department now take this interlocutory appeal under the authority of *Mitchell v. Forsyth*, 105 S.Ct. 2806, 2817 (1985).

Discussion

As a preliminary matter, we note that the Department cannot assert a qualified immunity defense. *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987). As to the Department, therefore, the district court's denial of summary judgment does not constitute a final appealable order, and we have no jurisdiction to consider it. 28 U.S.C. § 1291. The appeal of the Department is hence dismissed.[1]

Taylor, as an individual government official, is entitled to assert qualified immunity and therefore may appeal the denial of summary judgment which he sought on that basis. Taylor is entitled to qualified immunity if the federal right he is alleged to have violated was not clearly established at the time of his actions or if, even though the right was clearly established, his actions were objectively reasonable in light of the applicable federal law. *Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987). As it was well-established as of December 17, 1992 that arrest, detention, and/or prosecution without probable cause violates an individual's Fourth and Fourteenth Amendment rights, *see Sanders v. English*, 950 F.2d 1152, 1159 (5th Cir. 1992) (citing cases), the only question

[1] Although neither party has raised the issue, we note that the Department is almost certainly not a suable entity separate and apart from the city of Marble Falls. *See Darby v. Pasadena Police Department*, 939 F.2d 311, 313 (5th Cir. 1991).

in this case is whether Taylor's actions met the standard of objective legal reasonableness, i.e., whether Taylor had probable cause to seek the arrest warrant.

The objective reasonableness determination is typically to be resolved by the district court as a matter of law; only if material facts underlying the determination of objective reasonableness are in dispute should the district court refuse to grant summary judgment. *Mangieri v. Clifton*, 29 F.3d 1012, 1015-16 (5th Cir. 1994). Thus, to the extent that the facts surrounding Taylor's decision to obtain the warrant are undisputed, probable cause can properly be determined as a matter of law. *Hunter v. Bryant*, 112 S.Ct. 534, 537 (1991); *Blackwell v. Barton*, 34 F.3d 298, 305 (5th Cir. 1994). In this case, the historical facts leading up to the application for the arrest warrant are not disputed: Taylor made an investigation of the incident at the store, he obtained a written statement from Long revealing that Montoya had threatened Long, and he used this information to obtain the warrant. Montoya neither contends that Taylor manufactured evidence nor otherwise controverts Taylor's affidavit; he asserts only that the facts Taylor's investigation revealed were insufficient to give Taylor probable cause to arrest Montoya, as evidenced by the grand jury's failure to indict him. The fact that a grand jury refused to indict, however, is irrelevant to the determination whether there was probable cause to seek the warrant and does not create a material fact issue. *See Baker v. McCollan*, 99 S.Ct. 2689, 2695 (1979); *see also Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir.) (relevant inquiry in determining whether probable cause existed is

information available to the officer at the time the decision to arrest is made, regardless of whether that information ultimately proves to be unreliable), *cert. denied*, 109 S.Ct. 66, *and cert. denied*, 109 S.Ct. 135 (1988). Contrary to the district court's holding, therefore, this issue can be resolved as a matter of law. We thus turn to Montoya's Fourth and Fourteenth Amendment claims.

The essence of Montoya's Fourteenth Amendment claim is that he was deprived of a protected liberty interest as a result of Taylor's negligent investigation. He asserts that Taylor did not adequately corroborate the trustworthiness of Long's allegations by interviewing other store employees, including Montoya. An official's mere negligence, however, does not implicate the Due Process Clause. *Daniels v. Williams*, 106 S.Ct. 662, 663 (1989); *Herrara v. Millsap*, 862 F.2d 1157, 1160 (5th Cir. 1989). "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is `clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991). Because Taylor's negligence, if any, in investigating the incident is insufficient to constitute a violation of the Fourteenth Amendment, Taylor was entitled to qualified immunity as to this claim, and his motion for summary judgment should have been granted.

Montoya's allegation that he was arrested without probable cause does state a cause of action under the Fourth Amendment. *Duckett v. City of Cedar Park, Texas*, 950 F.2d 272, 278 (5th Cir.

1992). To overcome Taylor's qualified immunity, however, Montoya must also show that Taylor's actions were not objectively reasonable in light of his clearly established federal right.[2] *Anderson*, 107 S.Ct. at 3038. The United States Constitution does not require that an arrest be based on a warrant, only that it be supported by probable cause. *United States v. Fortna*, 796 F.2d 724, 739 (5th Cir.), *cert. denied*, 107 S.Ct. 437 (1986) *and cert. denied*, 110 S.Ct. 123 (1989). Montoya must show that any reasonable officer in Taylor's position would know that there was not probable cause to support the arrest warrant which he procured. *Malley v. Briggs*, 106 S.Ct. 1092, 1098 (1986).

"Probable cause exits `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*, 834 F.2d at 1218 (citation and footnote omitted). In support of his argument that no probable cause existed, Montoya's amended complaint alleges (1) that Taylor could not have thought Long would be a witness for the state, as alleged in Long's complaint, because Long did not in fact witness "the incident in question," (2) that Taylor did not adequately assure himself that Long's allegations were trustworthy, and (3) that any testimony Long could have provided concerning prior similar actions of the four employees involved in the December 12 incident would

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[2] Contrary to Montoya's assertion, the burden is on him to overcome Taylor's qualified immunity by demonstrating that Taylor's actions were objectively unreasonable. *Bennett v. City of Grand Prairie, Texas*, 883 F.2d 400, 408 (5th Cir. 1989).

not have been admissible as evidence at trial. None of these allegations establish a lack of probable cause.

The first of these allegations misapprehends the relevant inquiry. The incident for which Montoya was arrested was the alleged threat to Long, and Long clearly would have been a witness with regard to this incident.[3] The third allegation fails for the same reason; Long clearly could have testified on the basis of first-hand knowledge of the alleged threat.[4] The second allegationSQthat Taylor failed to adequately assure himself of Long's trustworthinessSQmight theoretically state a constitutional violation, but the record does not support it. The Supreme Court has stated that an informant's "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." *Illinois v. Gates*, 103 S.Ct. 2317, 2330 (1983). Long's statements to Taylor met these criteria.

The only concrete evidence Montoya offers in support of his contention that no probable cause existed is his attorney's

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[3] *Cf. United States v. Saunders*, 476 F.2d 5, 7 (5th Cir. 1973) (When an officer makes an arrest, which is properly supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcement of the wrong offense vitiates the arrest.).

[4] In addition, because probable cause encompasses a far broader range of information than is admissible in a criminal trial, whether Long's statements could be used as evidence at trial is irrelevant to the issue of probable cause. *See Bennett*, 883 F.2d at 405 ("The preliminary nature of the probable-cause determination . . . permits the issuance of an arrest warrant on `much less evidence' than is required to convict an individual.") (citation and footnote omitted).

affidavit certifying that the grand jury refused to indict Montoya on the retaliation charge. As noted above, this is irrelevant to the determination whether Taylor had probable cause to seek the warrant. *See Baker*, 99 S.Ct. at 2695. Montoya does not contend that Taylor "recklessly or intentionally omitted mention of material facts that were `clearly critical' to the probable cause determination," or that "`the deliberations of the [issuing judge] were in some way tainted by [Taylor's] actions . . ." *Sanders*, 950 F.2d at 1160 (citations omitted; first alteration in original). He therefore has failed to produce sufficient evidence to overcome Taylor's qualified immunity.

Finally, Montoya contends that Taylor's actions in investigating the incident and applying for the arrest warrant were merely ministerial. Although this allegation is more relevant to the inquiry whether the Department maintained a policy or custom of seeking warrants without probable cause, it is wrong in any event. The investigation of reported crimes and the decision whether to arrest a suspect are clearly discretionary. Indeed, one of the main reasons police officers enjoy only qualified, rather than absolute, immunity is to encourage officers to reflect before deciding to submit applications for warrants.[5] *See Malley*, 106 S.Ct. at 1097.

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[5] Similarly, under the Texas law doctrine of official immunity, police officers' investigative duties and decisions whether to arrest suspects are considered quasi-judicial (i.e., discretionary) in nature. *Wyse v. Texas Department of Public Safety*, 733 S.W.2d 224, 227 (Tex. App.SQWaco 1986, writ ref'd n.r.e.) (investigative duties); *Dent v. City of Dallas*, 729 S.W.2d 114, 117 (Tex. App.SQ Dallas 1986, writ ref'd n.r.e.), (decision to arrest), *cert. denied*, 108 S.Ct. 1272 (1988).

Conclusion

The interlocutory appeal of the Department is DISMISSED. The judgment of the district court denying summary judgment as to Taylor is REVERSED.