United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 7, 2024
Lyle W. Cayce
Clerk

No. 23-20075

MAXIMO ESPINAL,

Plaintiff—Appellant,

versus

CITY OF HOUSTON; OFFICER M. T. LONG; OFFICER C. K. LAM; JOHN DOE OFFICER,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-1149

Before HIGGINBOTHAM, HIGGINSON, and DUNCAN, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

Following a heated interaction with a Houston police officer, security guard Maximo Espinal was arrested for aggravated assault. Though a grand jury subsequently indicted Espinal, the charges were later dropped. Espinal then sued the officers involved and the City of Houston, alleging they subjected him to false arrest, malicious prosecution, and assault. The district court granted defendants' motion to dismiss all of Espinal's claims based on qualified immunity and immunity under Texas law. We AFFIRM.

I.

According to his complaint, Maximo Espinal was a security guard at a Houston office building. While on duty one night in 2020, Espinal saw a vehicle pull onto the property. It parked in a "dead end area" in front of a "No Trespassing" sign. Armed with a shotgun and a flashlight, Espinal went to investigate. As Espinal approached, the driver rolled down his window. The driver identified himself as Houston police officer M.T. Long. Officer Long was dressed in plain clothes but showed Espinal his badge. He then asked Espinal why he had a rifle. Espinal explained that it was a shotgun, and that he carried it because the property was in a high crime area. After agreeing that the area was dangerous, Officer Long departed.

The following evening, while Espinal stood outside with his shotgun, a vehicle again drove onto the property. It stopped five yards from where Espinal stood beneath a lamppost. The driver then backed up and rolled down his window, revealing himself as Officer Long from the night before. Officer Long "angrily shouted" about Espinal's rifle.[1] Espinal explained that his weapon was a shotgun, and that, as a security officer, he could not carry a rifle. This "seem[ed] to anger Officer Long even more." and he "kept on shouting at [Espinal]." Gripping his weapon at the "low ready," Espinal then told Officer Long "in no uncertain terms" that he was on private property and ordered him to leave and not come back. Officer Long protested

[1] Espinal does not allege why or what Officer Long shouted at him. Defendants suggest Long was concerned that Espinal was carrying a weapon he could not lawfully possess (hence the rifle versus shotgun dialogue) or that he was using it improperly. *See* § 35.7(a)–(e) (regulating use of firearms by security guards). Disagreeing, Espinal argues he was complying with Texas law. This disagreement is ultimately irrelevant to our analysis, so we need not address it.

that he was a police officer. Nonetheless, heeding Espinal's command, he departed.

An hour later, Officer Long returned with five Houston Police Department vehicles and arrested Espinal for aggravated assault. Among the arresting officers were Officer M.K. Lam and Officer "John Doe."[2] Espinal complied with the officers' orders, while "inform[ing] them . . . that there was video surveillance evidence to prove his innocence." The officers, however, "made no effort to view" or "collect" the video Espinal referenced. Instead, Officer Lam and Officer Doe drove Espinal to the Harris County jail.

A Texas grand jury subsequently indicted Espinal for aggravated assault of a police officer, but the State later moved to dismiss the charges. It explained that, while "[p]robable cause exist[ed]," Espinal's guilt could not "be proven beyond a reasonable doubt at this time." The court granted the motion and dismissed the charges.

Espinal then sued Officers Long, Lam, and Doe, and the City of Houston under 42 U.S.C. § 1983 for false arrest and malicious prosecution in violation of the Fourth and Fourteenth Amendments. Espinal also sued the officers (but not the City) for assault under Texas law.

The defendants moved to dismiss all claims, which the district court granted in full. The court concluded that the officers were entitled to qualified immunity on Espinal's § 1983 claims, and that, in any event, the grand jury's indictment of Espinal shielded them under the independent intermediary doctrine. And because Espinal had failed to allege any constitutional violation, the district court ruled that his claims against the

[2] Espinal describes Officer Doe as Caucasian, bald, and about six feet tall.

City must also be dismissed.[3] Finally, the court concluded that the officers were shielded from Espinal's assault claim under the Texas Tort Claims Act ("TTCA"). Espinal appealed.

II.

We review a dismissal under Rule 12(b)(6) *de novo*, accepting all well-pled facts as true and viewed in the light most favorable to the plaintiffs. *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ibid.*

III.

A.

First, we consider Espinal's claim that the officers[4] violated his Fourth Amendment rights by arresting him for aggravated assault of a police officer. Espinal contends the officers lacked probable cause. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

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[3] The district court also concluded that, even if Espinal had alleged a constitutional violation, he failed to allege it was pursuant to a custom or policy that could give rise to municipal liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

[4] Espinal's precise § 1983 theory against Officers Lam and Doe is unclear. At times, his brief seems to argue that they directly engaged in the alleged wrongdoing, at other times that they were liable only as bystanders for failing to intervene. We need not untangle this because any bystander liability would be predicated on an underlying constitutional violation. *See, e.g.*, *Joseph ex rel.Estate of Joseph v. Bartlett*, 981 F.3d 319, 343 (5th Cir. 2020). Because we conclude Espinal has failed to allege any violation of his constitutional rights by anyone, his bystander claims against Officers Lam and Doe necessarily fail. *Ibid.*

U.S. CONST. amend. IV. "Because arrests are 'seizures' of 'persons,' they must be reasonable under the circumstances." *District of Columbia v. Wesby*, 583 U.S. 48, 56 (2018). A warrantless arrest is reasonable if the officers have probable cause to believe the arrestee has committed a crime. *Ibid.*

"Probable cause for a warrantless arrest exists when all of the facts known by a police officer are sufficient for a reasonable person to conclude that the suspect had committed, or was in the process of committing, an offense." *Loftin v. City of Prentiss*, 33 F.4th 774, 780 (5th Cir. 2022) (internal quotation marks omitted). Probable cause "is not a high bar." *Kaley v. United States*, 571 U.S. 320, 338 (2014). A "fair probability" that the suspect has committed a crime is enough to establish probable cause. *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999). The likelihood that he has done so "need not reach [even] the fifty percent mark." *Ibid.* And even when an officer arrests a suspect without probable cause, the independent intermediary doctrine shields him from liability if a grand jury subsequently indicts the suspect. *See, e.g.*, *Deville v. Marcantel*, 567 F.3d 156, 170 (5th Cir. 2009) (per curiam); *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016).

Because a grand jury indicted Espinal, we can start (and end) our analysis with the independent intermediary doctrine. So, we assume *arguendo* that the officers lacked probable cause to arrest Espinal.[5] Espinal argues that the independent intermediary doctrine does not shield the officers for two reasons.

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[5] Likewise, we do not consider whether Espinal could overcome the officers' qualified immunity by showing that their actions, if unlawful, violated clearly established law. *Cf. McLin v. Ard*, 866 F.3d 682, 696 (5th Cir. 2017) (concluding that, although the independent intermediary doctrine did not apply, officers were nonetheless entitled to qualified immunity because the unlawfulness of their actions was not clearly established).

First, Espinal contends that the "taint" exception to the independent intermediary doctrine applies. Under this exception, the arresting officer may still be liable for false arrest if the grand jury's deliberations were "tainted"—*i.e.*, if the grand jury was given a purposely false or incomplete rendition of the facts. *Deville*, 567 F.3d at 170. In such circumstances, an indictment affords the officer no shelter. *Ibid.*

Merely invoking the taint exception is not enough. *See Shaw v. Villanueva*, 918 F.3d 414, 418 (5th Cir. 2019) (explaining "all broth and no beans" will not suffice to establish the exception). Rather, "a plaintiff must show that the official's malicious motive led [him] to withhold relevant information or otherwise misdirect the independent intermediary by omission or commission." *McLin*, 866 F.3d at 689. To survive a motion to dismiss, a plaintiff must at least allege "facts supporting [an] inference" of such wrongdoing. *Id.* at 690. In *McLin*, for instance, the plaintiffs alleged that officers held several meetings at which they "conspired . . . to create false and materially misleading arrest warrant affidavits," and that the jury indicted them based on that fraud. *Ibid.*

Such allegations are missing here. Indeed, Espinal's complaint lacks even "unadorned allegations" of taint, much less "specific facts showing that [the officers] misdirected" the grand jury. *Shaw*, 918 F.3d at 418. Espinal conceded as much at oral argument. So, the taint exception cannot save Espinal's false arrest claim.[6]

[6] At oral argument, Espinal argued that he might be able to amend his complaint to adequately allege taint and that he should be given an opportunity to do so. But that argument is nowhere in his briefs. We have "repeatedly and emphatically held [that] we cannot and will not consider arguments raised for the first time at oral argument." *Jackson v. Gautreaux*, 3 F.4th 182, 188 n.* (5th Cir. 2021).

Second, Espinal argues that, "even if Long did accurately portray the events [to the grand jury], the facts so lacked the indicia of probable cause that the independent intermediary doctrine should not save him here." In *Malley v. Briggs*, the Supreme Court held that an officer may be held liable for false arrest if he submits an obviously deficient arrest warrant application—even if a magistrate approves it. 475 U.S. 335, 342 (1986). We have recognized *Malley* as a "functional exception[] to the independent intermediary doctrine." *Wilson v. Stroman*, 33 F.4th 202, 208 (5th Cir.), *cert. denied sub nom. Reyna v. Wilson*, 143 S. Ct. 425 (2022), *and cert. denied*, 143 S. Ct. 426 (2022). In this context, the exception applies when the evidence presented to the grand jury "obvious[ly] fail[ed]" to establish the probable cause necessary for an indictment. *Melton v. Phillips*, 875 F.3d 256, 264 (5th Cir. 2017) (en banc); *Wilson*, 33 F.4th at 208–13 (explaining how *Malley* applies to independent intermediary doctrine).

The exception does not apply here. The facts Espinal alleges do not "obvious[ly] fail[]" to establish probable cause for aggravated assault under Texas law. *Melton*, 875 F.3d at 264. As relevant here, a person commits an assault by "intentionally or knowingly threaten[ing] another with imminent bodily injury." TEX. PENAL CODE § 22.01(a)(2). The assault is aggravated if the person "uses or exhibits a deadly weapon during the commission of the assault," *Id.* § 22.02(a)(2), and becomes a first-degree felony if committed against a police officer. *Id.* § 22.02(b)(2)(B).

Moreover, a threat need not always be verbalized. It can be implied. Accordingly, Texas courts have held that "the display of a weapon, without an express threat to use it," can sometimes be "sufficient to support a conviction" for aggravated assault. *Bryant v. Dir., TDCJ-CID*, 2009 WL 7360687, at *11 (E.D. Tex. Sept. 22, 2009), *R. & R. adopted*, 2011 WL 239653 (E.D. Tex. Jan. 24, 2011) (citing *Gaston v. State*, 672 S.W.2d 819, 820 (Tex. App.—Dallas 1983, no pet.); *see also De Leon v. State*, 865 S.W.2d 139, 142

(Tex. App.—Corpus Christi 1993, no pet.) (explaining "[t]he mere presence of a deadly weapon, under proper circumstances, can be enough to instill fear and threaten a person with bodily injury").

Espinal argues "there are no facts whatsoever" suggesting he threatened Officer Long with "*imminent* bodily injury." We disagree. According to Espinal, he told Long "in no uncertain terms" to leave and not come back. All the while, he held his shotgun at the ready. Under these circumstances, it was not obviously unreasonable to infer that Espinal was threatening to use his weapon if Long did not leave. *See, e.g.*, *Brown v. State*, 2010 WL 425063, at *3 (Tex. App. Feb. 8, 2010) ("Even though a threat of harm may be conditioned on the occurrence or nonoccurrence of a future event, it may nevertheless constitute assault if the threat, even though conditional, is imminent."). Again, probable cause "is not a high bar." *Kaley*, 571 U.S. at 338. The facts presented to the grand jury do not obviously fail to clear it. *Melton*, 875 F.3d at 264.

Alternatively, Espinal argues that, even if he did threaten Officer Long, he did so to defend himself and his employer's property. Espinal contends that, when Long pulled up, he "had every reason to believe that an unknown actor was trying to use deadly force in the form of a motor vehicle to either enter his place of employment . . . or 'was committing or attempting to commit aggravated kidnapping, murder, . . . robbery, or aggravated robbery.'" Based on this "exculpatory evidence," Espinal claims, there was obviously no probable cause to believe he had committed an aggravated assault.

We again disagree. To begin, we have "repeatedly refused to opine on whether 'facts supporting the existence of an affirmative defense are relevant to the determination of probable cause.'" *Loftin*, 33 F.4th at 780 n.2 (quoting *Piazza v. Mayne*, 217 F.3d 239, 246–47 (5th Cir. 2000) (per curiam)). And

because probable cause poses a low bar, courts that deem affirmative defenses relevant require that their application be "conclusive" to vitiate probable cause. *See, e.g.*, *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1061 (7th Cir. 2004); *Painter v. Robertson*, 185 F.3d 557, 571 (6th Cir. 1999).

Espinal's purported affirmative defense—defense of himself and his employer's property—is far from conclusive. Officer Long was not, as Espinal argues, an "unknown actor." He was a police officer whom Espinal quickly recognized. From that point, Espinal does not allege Long did anything to suggest he was there to "murder" Espinal or engage in other criminal activity. All Espinal claims Long did was shout at Espinal about his gun. In response, Espinal told Long "in no uncertain terms" to leave—arguably using his weapon to threaten Long into compliance. Under those circumstances, a reasonable officer would not have known "conclusively" that Espinal was acting in justified defense. *Hodgkins*, 355 F.3d at 1061. So, even assuming it is relevant to the probable cause analysis, Espinal's purported justification is not dispositive, much less obviously so. *Loftin*, 33 F.4th at 780 n.2; *Hodgkins*, 355 F.3d at 1061; *Melton*, 875 F.3d at 264.[7]

Accordingly, the independent intermediary doctrine defeats Espinal's false arrest claim against the officers. And because his false arrest claim against the officers fails, his claim against the City fails too. *See, e.g.*, *Buehler*, 824 F.3d at 551 (dismissing false arrest claims against both police officers and municipality under independent intermediary doctrine).

[7] To be clear, we do not suggest that a jury necessarily would reject any such defense by Espinal had the State put him on trial for aggravated assault. We conclude only that Espinal's claimed justification was insufficiently "conclusive" to vitiate probable cause that he had committed the offense. *Painter*, 185 F.3d at 571.

B.

Next, Espinal claims the officers violated his Fourth and Fourteenth Amendment rights by maliciously subjecting him to prosecution. To overcome the officers' qualified immunity, Espinal must (1) allege facts that "make out a violation of a constitutional right," and (2) show that the "right at issue was 'clearly established' at the time of the defendant[s'] alleged misconduct." *Jennings v. Patton*, 644 F.3d 297, 300 (5th Cir. 2011) (citing *Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009)). Espinal fails on both prongs.

First, some background. From 2003 to 2021, our court "explicitly denied the possibility of a constitutional malicious prosecution claim." *Guerra v. Castillo*, 82 F.4th 278, 289 (5th Cir. 2023); *see also Morgan v. Chapman*, 969 F.3d 238, 245 (5th Cir. 2020) (explaining "an *en banc* majority of this court extinguished the constitutional malicious-prosecution theory" in *Castellano v. Fragozo*, 352 F.3d 939, 954 (5th Cir. 2003) (en banc)). Instead, when a "defendant's bad actions (that happen[ed] to correspond to the tort of malicious prosecution) result[ed] in an unreasonable search or seizure, those claims [could] be asserted under § 1983 as violations of the Fourth Amendment." *Morgan*, 969 F.3d at 245–46.

Times have changed. In 2022, the Supreme Court "held that litigants may bring a Fourth Amendment malicious prosecution claim under § 1983." *Armstrong v. Ashley*, 60 F.4th 262, 278 (5th Cir. 2023) (citing *Thompson v. Clark*, 596 U.S. 36, 42 (2022)). We have since acknowledged that the Court's "clear recognition of the constitutional tort of malicious prosecution" overruled our precedent to the contrary. *Id.* at 279. Accordingly, we "reinstated" our pre-2003 malicious prosecution standard. *Ibid.* Under that framework, a plaintiff must allege the following elements:

> (1) the commencement or continuance of an original criminal proceeding; (2) its legal causation by the present defendant against plaintiff who was defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) malice; and (6) damages.

Ibid. (quoting *Gordy v. Burns*, 294 F.3d 722, 727 (5th Cir. 2002)).

With all this in mind, we consider Espinal's claim. Espinal fails under the first prong of qualified immunity, which requires him to allege facts supporting the elements of malicious prosecution. He falters on at least the second element. As explained above, *supra* Part III.A.1, Espinal has failed to allege that the officers misled the grand jury in any way. Accordingly, "[b]ecause [Espinal] has not plausibly alleged that the defendants suppressed, fabricated, or destroyed evidence" before the grand jury, he "has not plausibly alleged that the defendants were the cause of [his] prosecution." *Armstrong*, 60 F.4th at 278.

Alternatively, Espinal fails on the second prong of qualified immunity. At that step, we ask whether the defendants violated law that was clearly established at the time of their actions. *Jennings*, 644 F.3d at 300. Subsequent legal developments are immaterial. *Ibid.* Espinal was arrested and indicted in 2020, when the constitutional malicious prosecution tort did not exist in our circuit. *Guerra*, 82 F.4th at 289. So, the officers could not possibly have violated clearly established law at the time. *Ibid.* (concluding same).

Accordingly, the officers are entitled to qualified immunity as to Espinal's malicious prosecution claim. His claim against the City necessarily also fails. *See, e.g.*, *Petersen v. Johnson*, 57 F.4th 225, 235 (5th Cir. 2023).

C.

Finally, Espinal claims the officers assaulted him. But neither his complaint nor his briefing ever explain how or when they did so. *See Ashcroft*, 556 U.S. at 678 (holding for a complaint to survive Rule 12(b)(6), it must "state a claim to relief that is plausible on its face" (citation omitted)). In any event, as the district court concluded, his claim is foreclosed by Texas law.

The TTCA bars tort claims against government employees when (1) the alleged tort occurred "within the general scope of that employee's employment" and (2) "it could have been brought under [the TTCA] against the governmental unit." TEX. CIV. PRAC. & REM. CODE § 101.106(f); *see also Wilkerson v. Univ. of N. Tex. ex rel. Bd. of Regents*, 878 F.3d 147, 158 (5th Cir. 2017). Espinal does not contest that § 101.106(f)'s first requirement is met. He argues only that the second requirement is not satisfied. As Espinal correctly notes, the TTCA does not waive governmental immunity with respect to intentional torts like assault. *See* TEX. CIV. PRAC. & REM. CODE § 101.057(2). So, he contends, his claim "could [not] have been brought" against the City under the TTCA. *Id.* § 101.106(f).

Unfortunately for Espinal, the Texas Supreme Court has squarely rejected this argument. For purposes of § 101.106(f), "*any* tort claim . . . 'could have been brought' under the [TTCA] against the government regardless of whether the [TTCA] waives immunity" with respect to it. *Franka v. Velasquez*, 332 S.W.3d 367, 375–85 (Tex. 2011) (emphasis added) (quoting § 101.106(f)). Section 101.106(f)'s second prong only requires that a claim against a government employee "sound[] in tort." *Wilkerson*, 878 F.3d at 162. If it does, then it must be dismissed—even if the governmental unit "would be immune from suit." *Id.* at 161 n.16. In other words, claims like Espinal's are "foreclose[d]." *Franka*, 332 S.W.3d at 381;

see also, e.g., *Stinson v. Fontenot*, 435 S.W.3d 793, 794 (Tex. 2014) (deeming assault and other intentional tort claims barred by § 101.106(f)); *Smith v. Heap*, 31 F.4th 905, 913 (5th Cir. 2022) (deeming various intentional tort claims barred by § 101.106(f)).

IV.

The district court's judgment is AFFIRMED.