Supreme Court Case No. 65143

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUDY PALMIERI,

Appellant,

vs.

CLARK COUNTY, a political subdivision of the STATE OF NEVADA; DAWN STOCKMAN, CE096, individually,

Respondents.

Appeal from the Eighth Judicial District Court for the District of Nevada
Order Granting Motions for Summary Judgment

Case No. A-11-640631-C

APPELLANT'S RELY BRIEF

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I.

STATEMENT OF THE CASE

The Plaintiff/Appellant, Judy Palmieri has previously set fort her rendition of the issues presented for review, statement of the case, statement of jurisdiction, standards of review and statement of the facts in his Opening Brief in this matter. She will rely upon the same herein.

In this brief the Appellant will respond to the Appellee's characterization of Appellants' arguments and the Court's error in making the factual determination concerning probable cause. The Appellant relies upon her Opening Brief on all other arguments.

II.

ARGUMENT

A. APPELLEES MISCHARACTERIZE APPELLANT'S ARGUMENTS

Appellees' Answering Brief mischaracterizes Appellant's arguments, by simplifying Appellant's arguments so that the Appellee's may refute the overly-simplified arguments while ignoring the Appellant's actual reasoning. Specifically, Clark County argues that the Appellant "essentially asks this Court to create a new blanket rule." However, in actuality, the Appellant merely requests that a jury be allowed to decide questions of fact.

Cases based on violations of constitutional rights are often inappropriate for summary judgment. *Wright, Miller and Kane, Federal Practice and Procedure Civil*, 3d § 2732.2, at 152 (1998). This is because police misconduct cases almost always turn on a jury's credibility determinations. Drummond v. City of Anaheim, 343 F.3d 1052, 1056 (9th Cir. 2003). "Further, the very nature of the claims involved often presents factual issues that require summary judgment to be denied." Id. "Credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in her favor." Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986).

B. THE EXISTENCE OF PROBABLE CAUSE IS A QUESTION OF FACT FOR THE JURY TO DETERMINE

In a U.S.C. § 1983 case, the existence of probable cause is generally a jury question McKenzie v. Lamb, 738 F.2d 1005, 1008 (9th Cir. 1984)(In a 42 U.S.C. § 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury, and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest.).

"In making the determination of probable cause, an officer may not elect not to obtain easily discoverable facts." Kingsland v. City of Miami, 369 F.3d 1210, 1219 (11th Cir. 2004), *opinion withdrawn and superseded on other grounds*. For example in BeVier v. Hucal, parents sued a police officer who arrested them for child neglect. The Court found that the officer should have made a further inquiry of witnesses at the time of arrest in which event he would have learned facts that demonstrate no neglect had taken place. BeVier v. Hucal,806 F.2d 123 (7th Cir. 1986).

Similarly, An officer may not ignore exculpatory evidence and is required to conduct a reasonably thorough investigation where there is no exigency and law enforcement will not be unduly hampered. Kuehl v. Burtis, 173 F.3d 646 (8th Cir. 1999). Likewise, a jury may properly consider an officer's failure to investigate in determining whether probable cause existed. Clipper v. Takoma Park, Md., 876 F.2d 17 (4th Cir. 1989). An officer's failure to investigate presented a jury question whether facts supported probable cause. Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336 (7th Cir. 1985).

The probable cause standard of the Fourth Amendment requires officers to reasonably interview witnesses, investigate basic evidence, or otherwise inquire if a crime has been committed. Cortez v. McCauley, 478 F.3d 1108 (10th. Cir

2007)(failure of officers to interview readily available witnesses, to examine physical evidence, and to wait for forthcoming medical reports before taking plaintiff into custody based solely upon uncorroborated allegations violated plaintiff's rights and officers were not entitled to qualified immunity).

Moreover, the Eighth Circuit has determined that when officers have time to do so, failing to investigate "shocks the conscience". Wilson v. Lawrence County, 260 F.3d 946, 956 n.9 (8th Cir. 2001)(no countervailing governmental interest excuses officers from investigating leads when faced with an involuntary confession and no reliable corroborating evidence).

In establishing probable cause, officers may not solely rely on the claim of a citizen witness that he was a victim of a crime, but must independently investigate the basis of the witnesses' knowledge or interview other witnesses. Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001); *See also* Stoot v. City of Everett, 582 F.3d 910 (9th Cir. 2009)(Officer cannot solely rely on an uncorroborated, inconsistent statement to seize an alleged perpetrator of a crime). To survive summary judgment, a plaintiff need only make a substantial showing of a deliberate or reckless omission, not provide clear proof. Summary judgment is improper where there is a genuine dispute as to the facts and circumstances within an officer's knowledge or what the officer and claimant did or failed to do. Bravo

v. City of Santa Maria, 665 F.3d 1076 (9th Cir. 2011).

In the seminal case concerning the determination of whether there existed probable cause to obtain a search warrant under the "totality of the circumstances"the police received an anonymous letter. Illinois v. Gates, 462 U.S. 213 (1983) the letter stated:

> "This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, who live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue, his wife, drives their car to Colombia , where she leaves it to be loaded up with drugs and heroin, then Lance flies down the stair and runs back. Sue flies back home after she drops the car off in Illinois. May 3 she is driving down there again and the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their attic. They brag about the fact they never have to work, and make their entire living on pushers. I guarantee, if you watch them carefully you will make a big catch. They are friends with some big drug dealers who visit their house often." Illinois v. Gates, 462 U.S. at 225

In this case, the phone call by an individual impersonating Nichols is analogous to the anonymous letter in Illinois v. Gates. However the fact that distinguishes this case from Illinois v. Gates is that, in Gates, the detective who received the information decided to "pursue the tip" by conducting an investigation. Illinois v. Gates, 462 U.S. at 225-26. In doing so, the detective

contacted the office of the Illinois Secretary of State, and learned that an Illinois driver's license had been issued to one Lance Gates, residing at a stated address in Bloomingdale, Illiniois. The detective further contacted a confidential informant, whose examination of certain financial records revealed a more recent address for the Gateses, and he also learned from a police officer assigned to O'Hare Airport that L. Gates "had made a reservation on Eastern Airlines Flight 245 to West Palm Beach, Fla., scheduled to depart from Chicago on May 5 at 4:15 p. m." Id. The detective then made arrangements with an agent of the Drug Enforcement Administration for surveillance of the May 5 Eastern Airlines flight. The agent later reported to Mader that Gates had boarded the flight, and that federal agents in Florida had observed him arrive in West Palm Beach and take a taxi to the nearby Holiday Inn. They also reported that Gates went to a room registered to one Susan Gates and that, at 7 o'clock the next morning, Gates and an unidentified woman left the motel in a Mercury bearing Illinois license plates and drove northbound on an interstate highway frequently used by travelers to the Chicago area. In addition, the DEA agent informed Mader that the license plate number on the Mercury was registered to a Hornet station wagon owned by Gates. The agent also advised Mader that the driving time between West Palm Beach and Bloomingdale was approximately 22 to 24 hours. Id. Only after performing that investigation did the

detective in Gates apply for a search warrant.

Whereas, in this case, Stockman conceded that she made no effort identify the individual who claimed to be Kaitlyn Nichols. (*APP 000164, p. 16, ln. 13-25*). Although Stockman swore to a judge that her affidavit was truthful, during her deposition, Stockman also conceded that her affidavit included several fallacies, inaccuracies, and misrepresentations. Stockman conceded that if the individual filing the complaint was not Kaitlyn Nichols then her report "would all be fictitious" (*APP 000168, p. 32, ln. 5-6*). Likewise, Stockman conceded that she made no effort to determine whether Ms. Nichols was a former employee of Mrs. Palmieri. (*Id., p. 32, ln. 7 through p. 33, ln. 18*). Additionally, Stockman made no effort to investigate Kaitlyn Nichols' background. (*APP 000168, p. 33, ln. 25 through 000169, p. 34, ln, 2*). Stockman made no effort whatsoever to corroborate the purported report. Stockman did not seek preliminary information, such as a description of the residence. (*APP 000169, p. 34, ln. 13-15*). Incredibly, Stockman did not even ask the date of the alleged infractions which were the basis of the purported complaint. (*Id. p. 36, ln. 1 through p. 37, ln. 13*) Stockman likewise did not ever attempt to ascertain the number of animals alleged to be at Mrs. Palmieri's house. (*APP 000170, p. 38, ln. 1-6*). Stockman also conceded that the prior contacts which she detailed in her affidavit concerned incidents which were

not recent, but on the contrary, which had occurred approximately two and half to four years prior. (*APP 000172, p. 46, ln. 6-11; Id. p. 49, ln. 18-21*). Lastly, Stockman never contacted Officer Jason Elff , whose prior report Stockman claimed necessitated obtaining a search warrant (*Id. p. 49, ln. 12-17*).

The Gates court agreed that if the letter had just stood alone it would not be probable cause to get a warrant. Illinois v. Gates, 462 U.S. at 227. Specifically, the Court determined "[t]he letter provides virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gateses' criminal activities. Something more was required, then, before a magistrate could conclude that there was probable cause to believe that contraband would be found in the Gateses' home and car." Id.

Here, under "totality of circumstances" it was error for the Court to determine that probable cause existed because there are questions of fact concerning the individual impersonating Nichols' veracity, reliability and basis of knowledge. Additionally, the phone call in this case also lacked information that would allow Stockman to determine that the tip was honest, reliable or indicative of a probability of criminal activity. Consequently, a jury should be permitted to make the factual determination of whether there existed probable cause.

III.

CONCLUSION

The Appellant respectfully requests that this court reverse the district court's grant of summery judgment because the district court failed to view the evidence in the light most favorable to the Appellant as is required at the summary judgment stage. Additionally, the district court misapplied the doctrines of qualified and discretionary immunity.

DATED this 19th day of December, 2014.

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IV.

CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 32(a)(8), I certify that the Appellant's Opening Brief is proportionally spaced, has a font typeface of 14 points of Times New Roman type-style, and contains 1,901 words, and is 12 pages long.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of December, 2014.

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V.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRAP 25(1)(d) on the 19th day of December, 2014, I did serve at Las Vegas, Nevada a true and correct copy of **APPELLANT'S REPLY BRIEF**, on all parties to this action by:

- ☐ Facsimile
- ☐ U.S. Mail
- ☐ Hand Delivery
- X Electronic Filing

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