United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7133 **September Term, 2019**

FILED ON: DECEMBER 3, 2019

MARK THORP,

APPELLANT

v.

DISTRICT OF COLUMBIA AND RAMEY JOSEPH KYLE,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:15-cv-00195)

Before: ROGERS and GRIFFITH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

J U D G M E N T

The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the judgment of the District Court be **AFFIRMED**.

In 2015, Lieutenant Ramey Kyle of the Metropolitan Police Department ("the MPD") led a team of police officers that executed a search warrant of Mark Thorp's home for evidence of animal cruelty. In the course of executing that warrant, the police searched Thorp's refrigerator freezer and discovered a plastic bag of clear unmarked capsules. They field tested the capsules and determined that they contained amphetamines. Upon obtaining a second warrant to search for evidence of drug crimes, the police seized drugs, drug paraphernalia, and cash, as well as Thorp's dog, from Thorp's home.

Thorp filed suit against Kyle and the District, alleging a range of Fourth Amendment and common law violations. The district court dismissed some of these claims on the pleadings and later granted the District and Kyle summary judgment on the remaining claims. Thorp now argues that those decisions, as well as a handful of others, were in error. We affirm.

I.

On February 4, 2015, two MPD officers were parked near Thorp's home when they saw Thorp striking a dog on the street or sidewalk and heard the dog "yelp." One officer ran toward Thorp and asked him what he was doing, but Thorp carried the dog inside and declined to come out to speak with the officers. The officers contacted a supervisor for further instructions. The MPD in turn contacted the Washington Humane Society, which assigned humane law enforcement officer Ann Russell to speak with the officers. After speaking with them, Russell submitted an affidavit in support of a search warrant of Thorp's home for evidence of animal cruelty. The affidavit recited the events witnessed by the two Department officers and stated that, "[b]ased on [those facts], the Affiant believes that there is probable cause to believe that a dog maintained at [Thorp's home] has been cruelly beaten and is at risk of further abuse." Aff. in Support of Appl. for Search Warrant (Feb. 4, 2015). On the basis of that affidavit, a D.C. Superior Court magistrate issued a warrant to search Thorp's house for evidence of animal cruelty — specifically, for "[a]nimals physically abused (dead or alive, born or unborn, above ground or below)[,] bowls, water bowls, or any other evidence of animal cruelty/neglect." Search Warrant (Feb. 4, 2015).

Russell enlisted the assistance of the MPD's Fifth District Vice Unit, led by Lieutenant Kyle, to execute the warrant. Once inside Thorp's house, the officers quickly located and secured the dog. Russell determined that the dog appeared healthy and also noticed that there was a bag of dog food in the house. Nevertheless, the MPD officers continued to search the house, including searching Thorp's refrigerator freezer. Kyle discovered a bag of roughly 20 clear unmarked capsules in the freezer and instructed a MPD officer to conduct a field test to determine whether they contained an illegal controlled substance. The field test indicated that the capsules contained amphetamines.

The officers then paused the search and submitted an affidavit in support of a search warrant to search Thorp's house for evidence of possession with intent to distribute a controlled substance. A Superior Court judge issued the warrant. In the course of searching Thorp's house pursuant to that warrant, officers discovered and seized 100 capsules, a bag containing chunks of crystal rocks, several empty unused zip-top bags, and slightly more than $53,000 in cash. The officers arrested Thorp and seized his dog. The Drug Enforcement Agency subsequently determined the seized capsules contained MDMA, an illegal substance. The District filed criminal charges against Thorp, but they were later dropped by the U.S. Attorney's Office.

In 2015, Thorp sued the District and Kyle pursuant to 42 U.S.C. § 1983 and § 1985, alleging a range of constitutional and common law violations and a conspiracy to deprive him of his civil rights. The district court dismissed Thorp's claims based on conspiracy and malicious prosecution. Following discovery, the district court granted the District and Kyle summary judgment on Thorp's surviving Fourth Amendment, negligent supervision, and abuse of process claims. This court reviews *de novo* the district court's dismissal of Thorp's claims and its grant of summary judgment for the District and Kyle on the remaining claims. *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994).

II.

The heart of this case is Kyle's search of the refrigerator freezer. The Fourth Amendment protects against "unreasonable searches and seizures," U.S. Const. amend. IV, and its warrant requirement ensures, among other things, that the scope of a lawfully authorized research remains reasonably contained. *See Marron v. United States*, 275 U.S. 192, 196 (1927).

An officer is entitled to qualified immunity in a § 1983 suit, however, unless "the unlawfulness of [her] conduct was 'clearly unreasonable at the time.'" *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). A legal principle qualifies as clearly established law if it has "a sufficiently clear foundation in then-existing precedent." *Id.* Furthermore, that precedent must apply with a considerable degree of specificity to the official's conduct. The Supreme Court has "stressed the need to 'identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment.'" *Id.* at 590 (alteration in original) (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017)). "While there does not have to be 'a case directly on point,' existing precedent must place the lawfulness of the particular arrest 'beyond debate.'" *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). This is a "demanding standard" that "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 589 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Thorp contends that the search of his home should have ended once Russell secured the dog and ensured that it had food, and that Kyle's subsequent search of the freezer was thus a new, warrantless search. But as the district court noted, the terms of the warrant clearly authorized the officers to search for "[a]nimals physically abused (dead or alive . . .)" and "bowls" for food or water. *Thorp v. Dist. of Columbia*, 319 F. Supp. 3d 1, 12 (D.D.C. 2018) (quoting Search Warrant (Feb. 4, 2015)). A dead animal could have been conceivably found in Thorp's freezer. Indeed, Russell testified at her deposition that she told Kyle that in executing search warrants, she had "found deceased animals in freezers." Russell Dep. 90:6–11. Similarly, Russell's supervisor, who also had experience executing animal-cruelty search warrants, testified that in the past he "open[ed] refrigerators" in the course of searching for evidence of animal cruelty (specifically, looking for drugs associated with dogfighting). D'Eramo Dep. 158:18–20. Thus, the search of the freezer was within the scope of the animal-cruelty warrant and was therefore not warrantless, as Thorp urges.[1]

What remains of Thorp's argument, then, is that the search pursuant to the animal-cruelty warrant should have ended once Russell determined that there was no evidence of animal cruelty,

[1] The district court noted in granting summary judgment that "[p]erhaps the warrant went too far in so authorizing." *Thorp*, 319 F. Supp. 3d at 13. In other words, a warrant authorizing a search for "animals (dead or alive, born or unborn, above ground or below)" may have been overbroad, given the requirement that "the scope of [a] search . . . be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible," *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)), and the fact that Russell's affidavit articulated probable cause to believe that Thorp was abusing a particular dog. Thorp does not argue to this court, however, that the animal-cruelty warrant was overbroad or that Kyle should be held liable for executing an overbroad search warrant. Instead, Thorp insists that the search of his freezer was not authorized by the first warrant, which argument, as explained, is contrary to the plain text of the warrant. Whether the animal-cruelty search warrant was impermissibly broad is therefore not before the court.

and that Kyle acted improperly in searching the freezer after Russell concluded that there was no evidence of animal cruelty. Aspects of the continuation of the search after the dog had been secured, apparently healthy and well-fed, are troubling, for a potentially wide-ranging and open-ended search for "animals" and "bowls," even once Russell had determined that there was no need to continue from an animal-cruelty perspective, resembles a "general search[]" that the Fourth Amendment protects against. *Marron*, 275 U.S. at 196. At oral argument, counsel for the District denied that there could have been any development during the course of the search that would have rendered it impermissible for Kyle to search the freezer. Oral Arg. Rec. 16:55–17:17 (Oct. 23, 2019). Furthermore, Russell's supervisor testified at his deposition that "it is a definite possibility" that he and Russell "got played here," D'Eramo Dep. 141, suggesting that Kyle treated the animal-cruelty warrant as a cover to search Thorp's home for drugs.

Nevertheless, even if it were improper to continue the search after Russell deemed there to be no further need to search for evidence of animal cruelty, Kyle would be protected against liability by qualified immunity. An immunity defense will not succeed "when officers ignore what they learn as their own investigation progresses." *Corrigan v. Dist. of Columbia*, 841 F.3d 1022, 1032 (D.C. Cir. 2016). Kyle arguably failed to tailor his conduct to developing circumstances as the search proceeded, namely, to the discovery of the healthy dog and its food and to Russell's assessment, informed by her expertise as a humane law enforcement officer, that there was no need to continue to search for evidence of animal cruelty. Yet Kyle's search of the freezer did not violate clearly established law. The court is aware of no binding authority, and Thorp has cited none, for the proposition that Kyle was obligated to defer to Russell's determination, expert though it may have been, that the search should end. As such, Kyle enjoys qualified immunity against Thorp's claim that the freezer search was improper.

Upon consideration of Thorp's other arguments, we conclude they are without merit. Thorp has failed to show, and in many instances even seriously argue, that the district court's reasoned decisions were erroneous.

Accordingly, we affirm the decisions of the district court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk