21-2047

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 21-2047

BASEL M. SOUKANEH,

PLAINTIFF-APPELLEE,

- VS -

NICHOLAS ANDRZEJEWSKI,

DEFENDANT-APPELLANT,

DAVID ANDRZEJEWSKI,

DEFENDANT

On Appeal From The United States District Court
For The District of Connecticut

BRIEF OF PLAINTIFF-APPELLEE

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STATEMENT OF JURISDICTION

This action, alleging Fourth Amendment violations by a Waterbury, Connecticut, police officer, sought compensatory and punitive damages, costs and attorney fees pursuant to 42 U.S.C. § 1983. The defendant moved for partial summary judgment "on all claims relating to the search and seizure of the plaintiff's person and property, with the exception of the plaintiff's claim for the confiscation of $320 in cash and a flash drive containing photographs," which was granted in part and denied in part. One of the defendant's claims was qualified immunity. The defendant now brings an interlocutory appeal and he asserts that jurisdiction is appropriate under 28 U.S.C. § 1291.

ISSUE PRESENTED

The defendant-appellant claims that the District Court erred in denying summary judgment on the plaintiff's remaining claims, because of his assertion that he is protected by qualified immunity as to all of his actions in this matter.

STATEMENT OF THE CASE

The defendant-appellant is a police officer. One evening in Waterbury, Connecticut, he observed the plaintiff-appellee sitting in a still-running automobile. The plaintiff was searching on gps for a parcel of real estate which he was interested in buying. When the defendant approached his vehicle, the plaintiff immediately informed him that he had a firearm in the car and produced his Connecticut Firearms Permit. The defendant immediately dragged the plaintiff out of his automobile, threw him to the ground, handcuffed him, searched him, held him prisoner for over half an hour in the rear of his cruiser while he conducted a warrantless search of the plaintiff's entire car including the trunk. Finding nothing, he released the plaintiff from custody after stealing over three hundred dollars in cash and a flash drive containing photos and videos of his father from the pocket of the plaintiff's trousers. The plaintiff sued and the defendant moved for summary judgment.

In support of his summary judgment motion, the defendant characterized his conduct as nothing more than the equivalent of "approach[ing] a person in public and ask[ing] a few questions...." (Defendant's district court brief at p. 7) As such, he claimed it was not covered by the Fourth Amendment. He admitted, however, that it passed that point when handcuffs were applied, although he did not mention the violence he used before that.

The defendant argued that all of his actions were justified because, he claimed, he had no way of knowing that the plaintiff's firearms permit was not a forgery. In fact, he

claimed that these facts gave him not only a reasonable suspicion but probable cause to believe that the plaintiff had committed a crime of some unspecified sort. (Defendant's district court brief at p. 9) He claimed, therefore, that his warrantless search of the entire car - even the locked trunk - was perfectly proper. He also asserted the affirmative defense of qualified immunity.

The district court held:

1. The defendant acted lawfully when he briefly questioned the plaintiff, required him to exit his vehicle, and conducted a pat-down search. (Jt. App. 90)
2. Because the plaintiff presented a facially valid firearms permit when he disclosed that he had a pistol in his car, no reasonable police officer could have believed that the permit was a forgery and therefore no reasonable police officer could have believed that there was probable cause to arrest the plaintiff. Accordingly, the defendant's motion for summary judgment as to the claim of false arrest, based on his assertion of qualified immunity, could not prevail and therefore the summary judgment motion was denied as to the claim of false arrest. (JA A-91 - A-94)
3. The court denied the defendant's claim of qualified immunity as to the search of the passenger compartment of the plaintiff's car, holding that in light of the plaintiff's cooperativeness and his immediate presentation of a facially valid firearms permit, no reasonable police officer could believe that the plaintiff was both "armed *and* dangerous"

so as to justify such a search. *Citing* Knowles v. Iowa, 525 U.S. 113, 118 (1998). (JA 94 - JA 97)

4. The court also denied the defendant's qualified immunity claim as to his search of the automobile's trunk since there was nothing in the record to suggest that a reasonable police officer could have believed that there was probable cause that the plaintiff was committing or had committed the crime of unlawful possession of a firearm in a vehicle. (JA 97)

SUMMARY OF ARGUMENT

1. The defendant's claim that there was probable cause to arrest the plaintiff after it had been established that, although he had a firearm in his car, he was in possession of a facially valid firearms permit, is based entirely on the defendant's claim that a facially valid state permit is meaningless unless it has been checked with the issuing authority. There is no legal or rational support for that argument and none has been offered by the defendant.

2. The law has been clearly established for a very long time that conduct such as that engaged in by the defendant-appellee violates the Fourth Amendment. Knowles v. Iowa, 525 U.S. 113, 118 (1998).

ARGUMENT

I. STANDARD OF REVIEW

"A district court's grant of summary judgment is reviewed *de novo*." First Investors Corp. v. Liberty Mut. Ins. Co., 152 F.3d 162, 165 (2nd Cir. 1998); Westport Bank & Trust Co. v. Geraghty, 90 F.3d 661, 668 (2nd Cir. 1996). All inferences are draw in favor of the nonmoving party. Property Asset Management v. Chicago Title Insurance, 173 F.3d 84, 86 (2nd Cir. 1999); Stuart v. American Cyanamid Co., 158 F.3d 622, 626 (2nd Cir. 1998).

"A motion for summary judgment may properly be granted...only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant the entry of judgment for the moving party as a matter of law....The function of the district court in considering the motion for summary judgment is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists....In determining whether the moving party is entitled to judgment as a matter of law...or whether instead there is sufficient evidence in the opposing party's favor to create a genuine issue of material fact to be tried, the district court may not properly consider the record in piecemeal fashion, trusting innocent explanations for individual strands of evidence; rather, it must 'review all of the evidence in the record,' *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000)....And in reviewing all of the evidence to determine whether judgment as a matter of law is appropriate, 'the court must draw all reasonable inferences in favor of the nonmoving party,' *Reeves*, 530 U.S. at 150..., even though contrary inferences might reasonably be drawn....Summary judgment

is inappropriate when the admissible materials in the record make it arguable that the claim has merit..., for the court in considering such a motion must disregard all evidence favorable to the moving party that the jury is not required to believe....In reviewing the evidence and the inferences that may reasonably be drawn, the court may not make credibility determinations or weigh the evidence....Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge....Where an issue of material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate....In sum, summary judgment is proper only when, with all permissible inferences and credibility questions resolved in favor of the party against whom judgment is sought, there can be but one reasonable conclusion as to the verdict...." Kaytor v. Electric Boat Corporation, 609 F.3d 537, 545-6 (2nd Cir. 2010) (quotation marks and citations omitted). *Cf.*, Rasmy v. Marriot International, Inc., 952 F.3d 379, 386 (2nd Cir. 2020).

II. THERE WAS NO PROBABLE CAUSE FOR THE ARREST OR SEARCH

The reasonableness of a search always is at issue even if the search itself was lawful, as in this case it manifestly was not. *See generally, e.g.,* Dalia v. United States, 441 U.S. 238, 258 (1979); McKelvie v. Cooper, 190 F.3d 58 (2nd Cir. 1999); Duncan v. Barnes, 592 F.2d 1336, 1338 (5th Cir. 1979); Bergquist v. County of Cochise, 806 F.2d 1364, 1368-69 (9th Cir. 1986); Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1194 (10th Cir. 2001); Tarpley v. Greene, 684 F.2d 1, 8 (D.C. Cir. 1982).

All warrantless searches are, by definition, unreasonable and violate the Fourth

Amendment absent an exception to this general rule. Myers v. Patterson, 819 F.3d 625, 632 (2nd Cir. 2016). The burden of proving the existence of a valid exception to this general rule rests on the party claiming the benefit of the exception. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chimel v. California, 395 U.S. 752, 762 (1969); Stoner v. California, 376 U.S. 483 (1964); United States v. Jeffers, 342 U.S. 48, 51 (1951).

"[P]olice bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches...." Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984). To fall within one of the narrow exceptions to the warrant requirement, the police must demonstrate "that there was an 'urgent need to render aid or take action." United States v. Klump, 536 F.3d 113, 118 (2nd Cir. 2008), quoting United States v. MacDonald, 916 F.2d 766, 769 (2nd Cir. 1990) (*en banc*).

In this case, the sole basis for the defendant's assertion of probable cause is his preposterous claim that a facially valid firearms permit was meaningless unless and until the issuing authority confirmed that it was legitimate. The district court correctly held that no reasonable police officer could entertain such a belief.

III. QUALIFIED IMMUNITY IS NO DEFENSE IN THIS CASE

"A government official sued in his individual capacity is entitled to qualified immunity (1) if the conduct attributed to him is not prohibited by federal law...; or (2) where that conduct is so prohibited, if the plaintiff's right not to be subjected to such conduct by the defendant was not clearly established at the time of the conduct...; or (3) if the defendant's action was objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken." O'Bert ex rel. Estate of O'Bert v. Vargo, 331 F.3d 29,

36 (2nd Cir. 2003) (citations, quotation marks and ellipses omitted). "A defendant is entitled to qualified immunity only if he can show that, viewing the evidence in the light most favorable to plaintiffs, no reasonable jury could conclude that the defendant acted unreasonably in light of the clearly established law." Demoret v. Zegarelli, 451 F.3d 140, 148 (2nd Cir. 2006).

In this case, the defendant-appellant seems to base his argument on the theory that neither this court nor the Supreme Court has directly held that the possession of a facially valid firearms permit is not a relevant factor in determining whether the possession of a firearm in a motor vehicle establishes probable cause (1) to arrest the operator and (2) to search the entire car. His argument conveniently ignores a case, cited by the district court in its opinion, which directly refutes his claim although it did not involve a firearms permit. Knowles v. Iowa, 525 U.S. 113, 118 (1998), involved a motor vehicle stop for speeding. The officer issued the operator a citation for speeding, but on no other basis conducted a search of the car which resulted in the discovery of a small quantity of marijuana. The operator was thereupon taken into custody. The Supreme Court held that no probable cause existed and that there was no legitimate concern for "officer safety" which could justify the search.

Even if there is no case involving identical facts, the law requires that the affirmative defense of qualified immunity is available only if the officer's interpretation of existing law is reasonable. Jones v. Treubig, 963 F.3d 214 (2nd Cir. 2020). "The easiest cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the official would be immune from damages liability because no previous case had found liability in those

circum-stances." Doe v. Taylor Independent School Dist., 975 F.2d 137, 142 (5th Cir. 1992), quoting K.H. Through Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990). Cf. McDonald v. Haskins, 966 F.2d 292, 293-94 (7th Cir. 1992). "A constitutional violation that is so patent that no violator has even attempted to obtain an appellate ruling on it can be regarded as clearly established even in the absence of precedent." Anderson v. Romero, 72 F.3d 518, 526-27 (7th Cir. 1995) (Posner, C.J.).

"The fact that a statute has not been construed does not mean that there is no law, that anything goes....The clearest violations may never generate an appeal, just because there is no nonfrivolous ground for an appeal; and without an appeal there will be no authoritative judicial interpretation of the statute. It would be a considerable paradox to say that public officers have a license to commit statutory violations so outlandish that they have never been the subject of a published appellate decision....Suppose that the defendants had arrested [the plaintiff] for the possession of property given to him by his mother, on the theory that since mothers are notoriously soft-hearted any 'gift' from mother to son is actually a theft by the son....No reported case...has ever addressed this imaginative theory." Northen v. City of Chicago, 126 F.3d 1024, 1028 (7th Cir. 1997) (Posner, C.J.). "[T]he absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established....Indeed, it stands to reason that in many instances 'the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with' the well-recognized applications of the right at issue on the part of government actors." Johnson v. Newburgh Enlarged School District, 239 F.3d 246, 251 (2nd Cir. 2001), quoting Eberhardt v. O'Malley, 17 F.3d 1023, 1028 (7th Cir. 1994). *Cf.*, Sh.A. v. Tucumcari Municipal Schools, 321 F.3d

1285, 1288 (10th Cir. 2003). On the facts of this case, *Knowles* and the vast array of other Fourth Amendment cases in this circuit and in the Supreme Court leave no doubt that the defendant's actions are not protected by qualified immunity.

CONCLUSION

The ruling of the district court should be affirmed.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

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