FILED
United States Court of Appeals
Tenth Circuit

August 23, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANNETTE MORALES,

Plaintiff - Appellant,

v.

RICKY HERRERA, in his individual and official capacity as an officer of the New Mexico State Police; FELIPE GONZALEZ, in his individual and official capacity as a sergeant of the New Mexico State Police; NORMAN RHOADES, in his individual and official capacity as an officer of the New Mexico State Police,

Defendants - Appellees.

No. 17-2186
(D.C. No. 2:15-CV-00662-MCA-KRS)
(D. N.M.)

ORDER AND JUDGMENT*

Before **MATHESON**, **EBEL**, and **EID**, Circuit Judges.

New Mexico State police officers Ricky Herrera and Norman Rhoades arrested plaintiff-appellant Annette Morales on a warrant for charges of fraud and embezzlement. The district attorney later dismissed the charges against Morales, and she filed a civil rights suit against Herrera, Rhoades, and their supervisor Felipe Gonzalez. The district

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

court granted summary judgment to defendants on the basis of qualified immunity. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

A.

Sunland Park is a city in southern New Mexico that abuts El Paso, Texas to the east and Ciudad Juárez, Mexico to the south. The City received $11.8 million to build a pedestrian border crossing between Sunland Park and the Anapara neighborhood in Ciudad Juárez. To initiate development, the City asked six vendors to submit proposals for, among other things, "develop[ing] strategic actions, projects and programs" for the border project. ROA, Vol. I at 63. Medius Inc., a company owned by plaintiff Annette Morales, was the only vendor to submit a proposal. Morales calculated her proposal's contract price by adding "direct costs, overhead, and a 3.5 multiplier." *Morales v. Herrera*, No. 2:15-CV-00662 MCA/LAM, 2017 WL 4251683, at *1 (D. N.M. Sept. 25, 2017). The City awarded Medius the contract.

In March 2011, the City and Medius entered into a contract for a one-year period to develop a strategic framework for the City's border project. *Id.* The contract provided that the City "shall pay to the Contractor in full payment for services satisfactorily performed based upon deliverables, such compensation not to exceed one million dollars ($1,000,000)." *Id.* To receive payment, Morales was required to "submit a detailed statement accounting for all services performed and related expenses by tasks [sic] outlined in the 'Scope of Work.'" *Id.* (alteration in original). Expenditure records must "indicate the date, time, nature and cost of services rendered during the [contract's]

term." *Id.* at *5. The contract did not authorize Medius to use a 3.5 multiplier to calculate its fee. Indeed, the contract nowhere specified how funds would be allocated between expenditures and Medius's fee, *i.e.*, whether it was a fixed price, cost reimbursement, or another type of contract. *Id.* at *1; *cf.* N.M. Stat. Ann. § 13-1-47 (defining cost reimbursement contracts); *id.* at § 13-1-58 (defining fixed price contracts).

After six months the City exercised its right to terminate the contract. *See* ROA, Vol. I at 67 (Contract ¶ 4.A at 2). The city council found that Medius had "little to show" for the time spent. *See* ROA, Vol. I at 78.

B.

In April 2012, defendants Herrera and Rhoades, officers with the New Mexico state police, began investigating the legality of Morales's billing under the contract. Herrera prepared an arrest affidavit and executed it before Judge Susan M. Reidel, who issued a warrant for Morales's arrest. In August 2012, Herrera and Rhoades arrested Morales for fraud and embezzlement in violation of N.M. Stat. Ann. § 30-16-6 (fraud) and § 30-16-8 (embezzlement). Charges against Morales were later dismissed by the district attorney.

Morales sued Herrera, Rhoades, and their supervisor Gonzalez under 42 U.S.C. § 1983. Her complaint alleged, among other things, that her arrest violated the Fourth and Fourteenth Amendments to the United States Constitution. The gravamen of her suit is that Herrera's affidavit did not establish probable cause because it contained false statements and statements by a complaining witness who lacked credibility. The defendants moved for summary judgment.

The district court granted summary judgment to the defendants on the basis of qualified immunity. After "examin[ing] the affidavit without considering the allegations" Morales contends were false or lacked credibility, the court found that the defendants still had "arguable probable cause" to arrest Morales for fraud. *Morales*, 2017 WL 4251683, at *5–6. Having concluded that Morales could be lawfully seized for fraud, the court determined there was no need to assess whether the defendants also had probable cause on the embezzlement charge, reasoning that an "individual is no more seized when he is arrested on three grounds rather than one." *Id.* at *4 (quoting *Holmes v. Vill. of Hoffman Estates*, 511 F.3d 673, 682 (7th Cir. 2007)). On appeal, Morales reprises her argument that misrepresentations and credibility issues rendered the warrant unsupported by probable cause.

II.

Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We review de novo grants of summary judgment based on qualified immunity and examine the evidence in the light most favorable to the plaintiff. *Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1172 (10th Cir. 2013). "[W]hen a defendant asserts qualified immunity, the plaintiff carries a two-part burden to show: (1) that the defendant's actions violated a federal constitutional or statutory right, and, if so, (2) that the right was clearly established at the time of the defendant's unlawful conduct." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (quotations omitted).

Under New Mexico law, "[f]raud consists of the intentional misappropriation or taking of anything of value that belongs to another by means of fraudulent conduct, practices or representations." N.M. Stat. Ann. § 30-16-6(A). We conclude that the defendants did not violate Morales's Fourth Amendment rights because they had probable cause to believe that Morales had committed fraud under § 30-16-6(A), and that therefore Morales cannot establish that a constitutional violation occurred to satisfy the first prong of the qualified immunity analysis.

A.

The Fourth Amendment protects the "right of the people to be secure . . . against unreasonable searches and seizures." An arrest is an unreasonable seizure if "the arresting officer acted in the absence of probable cause that the person had committed a crime." *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012). Probable cause requires only a "fair probability" of illegal conduct—not "proof that something is more likely true than false." *See United States v. Denson*, 775 F.3d 1214, 1217 (10th Cir. 2014). It is "a fluid concept," measured by "the totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 232–33 (1983) (punctuation altered).

Herrera, Gonzales, and Rhoades began investigating Medius's performance under the contract in April 2012. Morales gave Herrera a spreadsheet that "outlined all expenditures for Medius," from March 2011 to October 2011. *See Morales*, 2017 WL 4251683, at *5. The City provided the invoices that Medius had submitted to the City. Herrera suspected that Morales committed fraud because Medius was billing the City almost double its documented expenses, including expenses that seemed unrelated to the

contract and for work that had not been performed. Herrera prepared an affidavit and executed it before Judge Reidel, who issued a warrant for Morales's arrest.

In her complaint and appellate briefing, Morales argues that the defendants obtained the arrest affidavit by misrepresenting her billing records. Specifically, she argues that she provided the defendants with "well over a thousand pages of regional reports, legal ordinances, and administrative materials" that substantiated her charges for meetings and deliverables. Aplt. Br. at 7. She also argues that the arrest warrant "failed to inform" the issuing judge that one of the complaining witnesses, Frank Coppler, had allegedly made "false statements" and had "credibility issues." *Id.* at 11. She concludes that the arrest affidavit was "fatally defective" under the Fourth Amendment. *See id.* at 15.

"It is a violation of the Fourth Amendment for an arrest warrant affiant to 'knowingly, or with reckless disregard for the truth,' include false statements in the affidavit, or to knowingly or recklessly omit from the affidavit information which, if included, would have vitiated probable cause." *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996) (internal citation omitted) (quoting *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978)). *Wolford* concerned an employee for the Sheriff of San Juan County who helped to maintain a confidential informant fund. *Id.* at 486. She was arrested on charges of forgery and embezzlement related to this fund. *Id.* at 486–87. After she was acquitted at trial, she filed suit under § 1983, alleging, among other things, that the investigating officer had omitted exculpatory evidence from the arrest affidavit. *Id.* at 487. "[E]xamining the affidavit as if the omitted information had been included," we

held that the officer was immune from suit because inclusion of the allegedly exculpatory facts would not have "vitiated probable cause" given the evidence that plaintiff had forged her superior's signature on one check and also used the fund for personal use. *Id.* at 489.

Similarly, we upheld an arrest made under a warrant predicated on alleged misstatements in *Taylor v. Meacham*, 82 F.3d 1556, 1562 (10th Cir. 1996). In *Taylor*, the police arrested a man on a warrant for charges of rape and murder; the prosecutor later dismissed the charges, and the man filed suit alleging that his arrest warrant "contained deliberately false statements." *Id.* After excising the statements from the affidavit—about the perpetrator's nickname and the make of his car—we held that a "wealth of uncontested facts" provided the investigating officers with probable cause to arrest the plaintiff. *Id.*

Applying the "principles set out in *Taylor*," the district court "examin[ed] the affidavit without considering the allegations" Morales contends were false or lacked credibility. *Morales*, 2017 WL 4251683, at *5. The district court concluded that considering the affidavit without the portions that Morales considered to be false or lacking in credibility, the defendants had "arguable probable cause" to arrest Morales, and therefore were entitled to qualified immunity. We agree that the defendants are protected by qualified immunity. As in *Taylor*, we conclude that the officers had *actual*,

not just arguable, probable cause. *See* 82 F.3d at 1562–63.[1] Even after excising the challenged portions, the arrest affidavit included sufficient facts to establish a probable cause belief that Morales was guilty of fraud.

Morales invoiced the City a total $457,777.80 while only claiming $203,620.49 in expenses during that period. *Morales*, 2017 WL 4251683, at *3, 5.[2] Although Morales may have provided a myriad of documents, the records she submitted did not justify the discrepancy because they did not connect "all services performed" to "related expenses." *Id.* at *1. Ultimately, Herrera concluded that between $262,028.73 and $271,775.42 of the $457,777.80 invoiced by Morales was "inconsistent with the claimed expenditures." ROA, Vol. I at 47. The discrepancy between Medius's expenses and the invoice is allegedly explained by Morales's application of a "3.5 multiplier," which she claims is "recognized within the industry." *Morales*, 2017 WL 4251683, at *5; *cf.* ROA, Vol. II at 259 (including the multiplier on an invoice). But the district court found that "neither the RFP nor the Contract specified the contract type," nor did the contract include any "mention of a fee, profit, markup, or multiplier." *Id.* at *5. The defendants would not have had any basis to conclude that Morales was authorized to invoice the City almost double her claimed expenditures.

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[1] Because we conclude that there was actual probable cause, we need not address whether the district court's "arguable probable cause" conclusion was a "doctrinally improper" modification of the *Taylor* analysis. Aplt. Br. at 12.

[2] In the arrest affidavit, Herrera listed Medius's expenditures as $233,170.71. *See* ROA, Vol. I at 47 (arrest affidavit at 5). We agree with the district court that this discrepancy is "immaterial" to assessing probable cause. What matters is that the amount billed far exceeded expenditures.

Under the totality of the circumstances, we conclude that the defendants had probable cause to believe that Morales had defrauded the City. Disregarding the contested portions of the arrest, the defendants still had probable cause to believe that Morales committed fraud by billing the City for more money than the contract authorized. *See* N.M. Stat. Ann. § 30-16-6(A). Accordingly, Morales's arrest was supported by probable cause and thus was reasonable under the Fourth Amendment.

B.

Morales argues that sustaining the arrest affidavit "functionally eviscerate[s] and overrule[s]" two of our cases: *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990), and *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004). Aplt. Br. at 16. We disagree.

Stewart and *Pierce* illustrate the kind of police error that, once corrected, vitiate probable cause. In *Stewart*, the police obtained a warrant to arrest the plaintiff for larceny but did not mention that the primary complaining witness had "recanted his testimony and confessed it was fabrication." 915 F.2d at 583. We held that the omission was "highly material" and would have invalidated probable cause had it been included in the arrest affidavit. *Id.* And in *Pierce*, we held that a man convicted of rape until later exonerated by DNA evidence had sufficiently pled a malicious prosecution claim because he credibly alleged that a forensic scientist "withheld exculpatory evidence and fabricated inculpatory evidence." 359 F.3d at 1293. Specifically, the plaintiff alleged that the defendant had misrepresented the findings of "hair analysis" and disregarded blood evidence that proved defendant could not have been the source of sperm found on the

rape victim. *Id.* at 1293–94. We held that these allegations, if true, would disentitle the defendant to qualified immunity so the plaintiff survived a motion to dismiss.

In stark contrast to *Stewart* and *Pierce*, here there exists a subset of uncontested evidence showing that Medius billed the City roughly double its expenses. *See Taylor*, 82 F.3d at 1562. Though the contract required Morales to provide a detailed billing statement, it never authorized Morales to use a multiplier. Nor is a multiplier discussed in the bid proposal or proposed budget. Furthermore, no documents given to defendants explained how a 3.5 multiplier accounted for the wide discrepancy between Medius's invoice and its expenditures. This evidence established that there was probable cause to believe that Morales committed fraud.[3] *See Denson*, 775 F.3d at 1217.

C.

Our conclusion that defendants had probable cause to arrest Morales is sufficient to resolve this case. *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1199 (10th Cir. 2009) (explaining that a court may affirm qualified immunity if "plaintiffs failed either" prong of "their two-part burden"). Because we conclude that there was probable cause to arrest Morales, she cannot satisfy the first prong of the qualified immunity analysis.

[3] Morales also argues that it was reasonable for her to believe that her billing was "appropriate" because the City had "never questioned" her invoices, thereby establishing a "course of performance." Aplt. Br. at 19–20. This argument is unavailing. For one thing, a course of performance can be fraudulent. *See, e.g.*, *United States v. Naiman*, 211 F.3d 40, 44, 49 (2d Cir. 2000). For another, under New Mexico contract law, the course-of-performance rule clarifies an ambiguous "term or expression to which the parties have agreed," Aplt. Br. at 19 (quoting *C.R. Anthony Co. v. Loretto Mall Partners*, 817 P.2d 238, 242 (N.M. 1991))—it does not fill gaps in the contract.

III.

We affirm the district court's judgment.

Entered for the Court

Allison H. Eid
Circuit Judge