FILED
United States Court of Appeals
Tenth Circuit

September 8, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILLIAM MONTGOMERY,

Plaintiff - Appellant,

v.

MATTHEW BRUKBACHER,

Defendant - Appellee.

No. 21-1073
(D.C. No. 1:20-CV-03231-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **PHILLIPS**, Circuit Judges.

William Montgomery, proceeding pro se, asks us to reverse the district court's dismissal of his complaint asserting a Fourth Amendment claim under 42 U.S.C. § 1983.[1] Finding no merit to his arguments, we affirm.

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

[1] Because Montgomery appears pro se, we liberally construe his pleadings but won't act as his advocate. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

BACKGROUND[2]

In October 2018, Montgomery was standing on a median in the middle of a street in Aurora, Colorado, when Officer Matthew Brukbacher and his partner pulled up in their police vehicle. Montgomery was holding a blank piece of cardboard at his side.

Officer Brukbacher told Montgomery that he couldn't be on the median and that he needed to move to the sidewalk. Montgomery refused to budge, telling Officer Brukbacher to write him a ticket if he had done something wrong. Officer Brukbacher asked Montgomery, "You think this is a legal place to stand, that you're not impeding traffic?" Appellant's App. at 8. After Montgomery responded that it was "100% legal" for him to stand there, Officer Brukbacher told Montgomery to move off the median so they could talk it over. *Id.*

Once in a nearby parking lot, Officer Brukbacher's partner asked for Montgomery's ID, which he supplied. Officer Brukbacher then took "a few minutes" to fill out a citation for unlawful solicitation from a traffic median under Aurora

[2] We draw the factual background from Montgomery's Complaint. Because we're reviewing the district court's dismissal of the Complaint for failure to state a claim, we accept as true the facts alleged and view them in the light most favorable to Montgomery. *Cf. Mayfield v. Bethards*, 826 F.3d 1252, 1255 (10th Cir. 2016) ("In reviewing a motion to dismiss, we accept the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff." (citation omitted)).

Municipal Code § 94-117(b)(2).[3] *Id.* at 8–9. After Officer Brukbacher reviewed the citation with Montgomery, Montgomery asked if he had been subjected to a non-custodial arrest. Officer Brukbacher responded that he had, and that Montgomery had been "lawfully detained based on the probable cause that existed for [the citation]." *Id.* at 9. Officer Brukbacher then returned Montgomery's ID, gave him the citation, and told him that he was "free to go." *Id.* at 9. Aurora's municipal attorney later dropped the charge against Montgomery.

Based on that encounter, Montgomery filed a complaint in the District of Colorado asserting a single claim against Officer Brukbacher under 42 U.S.C. § 1983, which "provides a cause of action for the deprivation of constitutional rights by persons acting under color of state law." *Torres v. Madrid*, 141 S. Ct. 989, 994 (2021). Montgomery alleged that Officer Brukbacher violated his Fourth Amendment right to be free from unreasonable seizures. Specifically, Montgomery alleged that Officer Brukbacher didn't investigate to confirm his suspicions, so he lacked probable cause to detain him while writing the solicitation citation.

The district court granted Montgomery leave to proceed in forma pauperis under 28 U.S.C. § 1915. But it dismissed his claim in accordance with § 1915(e)(2)(B), concluding that Montgomery's Complaint failed to state a claim

[3] The Code states in relevant part: "It shall be unlawful for any person to solicit or attempt to solicit employment, business, contributions, or sales of any kind or collect monies for such from the occupant of any vehicle traveling upon any street or highway when: . . . (2) Such solicitation or collection causes the person performing the activity to be located upon any median area . . . ." Aurora, Colo., Mun. Code § 94-117(b)(2), https://aurora.municipal.codes/Code/94-117.

upon which relief may be granted.[4] Acknowledging that Montgomery had been seized, the court distinguished between two types of seizures: arrests, which require probable cause; and investigative detentions, which require only reasonable suspicion. The court next concluded that Officer Brukbacher had conducted an investigative detention rather than an arrest. And because reasonable suspicion supported the detention, the court dismissed Montgomery's Complaint. Exercising jurisdiction under 28 U.S.C. § 1291, we grant Montgomery's petition to proceed in forma pauperis but affirm the district court's dismissal.

DISCUSSION

Montgomery raises one issue on appeal: whether the officer's detaining him "in order to issue him the citation" required probable cause. Appellant's Br. at 2 (emphasis omitted).

Generally, we review a district court's dismissal under § 1915 for an abuse of discretion. *See Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006) (citation omitted). But when the district court's determination "turns on an issue of law, we review the determination *de novo*." *Trujillo v. Williams*, 465 F.3d 1210, 1216 (10th Cir. 2006) (citation omitted). "Dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts

[4] Section § 1915(e)(2)(B) requires that a district court dismiss an action if it is (1) frivolous or malicious, (2) fails to state a claim upon which relief may be granted, or (3) seeks monetary relief against a defendant who is immune from such relief. The district court didn't opine on the first or third circumstances.

he has alleged and it would be futile to give him an opportunity to amend." *Gaines v. Stenseng*, 292 F.3d 1222, 1224 (10th Cir. 2002) (citation omitted).[5]

The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. The Supreme Court has identified three types of police encounters: "(1) consensual encounters which do not implicate the Fourth Amendment; (2) investigative detentions," otherwise known as *Terry* stops, "which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause." *United States v. White*, 584 F.3d 935, 944–45 (10th Cir. 2009) (citation omitted). The district court ruled that Officer Brukbacher lawfully conducted the second type of encounter. We agree.

A *Terry* stop occurs when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). In deciding whether a police encounter rises to the level of an investigatory stop, we must determine "whether a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information." *United States v. Mercado-Gracia*, 989 F.3d 829, 836 (10th Cir. 2021) (brackets, internal quotation marks, and citations omitted).

[5] Though the district court gave Montgomery an opportunity to amend his original complaint, Montgomery didn't do so by the deadline, nor did he request an extension of time. So the district court relied on the allegations in Montgomery's original complaint in determining that he had failed to state a claim for relief.

We agree with the district court that Montgomery was seized and subjected to a *Terry* stop when Officer Brukbacher retained his ID while he issued him a citation. *Cf. United States v. Tafuna*, 5 F.4th 1197, 1203 (10th Cir. 2021) ("When an officer retains an individual's driver's license in the course of questioning him, that individual, as a general rule, will not reasonably feel free to terminate the encounter." (brackets, internal quotation marks, and citation omitted)).

Having determined that Montgomery was seized, we next consider whether the seizure was reasonable. Under *Terry*, we make a dual inquiry, asking first "whether the officer's action was justified at its inception," and second "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20.

Here, the stop was justified at its inception when the officer observed Montgomery standing on a median holding a piece of cardboard at his side and suspected that Montgomery was attempting to solicit money. But as we understand Montgomery's argument, he doesn't dispute this point. Instead, he complains of the officer's *continued* detention of him to issue a summons and citation. According to Montgomery, issuing the summons and citation exceeded the scope of the stop, so the officer needed probable cause. And since Montgomery argues that the officer lacked probable cause, the officer allegedly violated his Fourth Amendment rights. Thus, we tailor our analysis to whether the officer acted within the scope of the initial stop by issuing a summons and citation.

In considering the reasonableness of investigatory stops in the pedestrian context, this court has previously analogized to investigatory stops in the traffic context. *See United States v. Burleson*, 657 F.3d 1040, 1047 (10th Cir. 2011) ("[T]he same rationale that underlies our conclusion as to the permissibility of warrants checks in the motorist context applies with equal force in the pedestrian context."). After all, "[w]e have held that a routine traffic stop is more analogous to an investigative detention than a custodial arrest," and applied *Terry* principles. *United States v. Bradford*, 423 F.3d 1149, 1156 (10th Cir. 2005) (citation omitted); *see also Berkemer v. McCarty*, 468 U.S. 420, 439 n.29 (1984) ("[M]ost traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*.").

It is well settled that as part of a lawful traffic stop, the Fourth Amendment authorizes an officer, among other things, "to issue a citation." *United States v. Morgan*, 855 F.3d 1122, 1126 (10th Cir. 2017). We see no reason why this would be any different for investigatory stops in the pedestrian context. We find persuasive the Supreme Court's analysis in *Knowles v. Iowa*, 525 U.S. 113 (1998). There, a police officer stopped a motorist for speeding, issued him a citation, and then searched his vehicle, locating and seizing a bag of drugs. *Id.* at 114. The Court concluded that the search of the car wasn't covered under the "search incident to arrest" exception. *Id.* at 117–19. In analyzing the facts of *Knowles*, our circuit observed: "The Supreme Court rejected the state's argument that the issuance of a citation transformed a routine traffic stop into something of a significantly graver magnitude and held that, even after the issuance of a citation, '[a] routine traffic stop . . . is more analogous to a so-

called "*Terry* stop" . . . than to a formal arrest.'" *Martinez v. Carr*, 479 F.3d 1292, 1296 (10th Cir. 2007) (alterations in original) (emphasis added) (quoting *Knowles*, 525 U.S. at 117). So too here. Officer Brukbacher's issuance of a citation and summons "did not qualitatively alter the nature of [Montgomery]'s . . . detention." *Id.*[6]

This is true despite the exchange between Officer Brukbacher and Montgomery, in which Montgomery asked whether he had been subjected to a "non-custodial arrest" and Officer Brukbacher responded: "Correct." Appellant's App. at 9. We distinguish an arrest based on "the involuntary, highly intrusive nature of the encounter." *Lundstrom v. Romero*, 616 F.3d 1108, 1120 (10th Cir. 2010) (citation omitted). The encounter with Officer Brukbacher wasn't highly intrusive.

Having determined that Officer Brukbacher's actions fell within the scope of the investigative stop, we reject Montgomery's argument that he was unreasonably seized.

[6] Montgomery spends much of his briefing arguing that "just because a 'traditional custodial arrest' never takes place, it doesn't necessarily mean that such a detention is automatically justifiable with the lower standard of reasonable suspicion." Appellant's Br. at 4 (emphasis omitted). We agree with this basic premise. *See White*, 584 F.3d at 952 ("[B]ecause 'reasonableness' is the touchstone of Fourth Amendment analysis, the partition between investigative detentions and de facto arrests cannot be defined by any 'litmus-paper test.'" (quoting *Florida v. Royer*, 460 U.S. 491, 506 (1983)). Nonetheless, we disagree that Officer Brukbacher's issuing of a citation exceeded the scope of the investigative stop or rose to the level of an arrest (of any form).

CONCLUSION

For the foregoing reasons, we grant Montgomery's motion to proceed in forma pauperis,[7] but we AFFIRM the district court's dismissal.

Entered for the Court

Gregory A. Phillips
Circuit Judge

[7] Though the district court denied Montgomery's application to proceed in forma pauperis on appeal, we grant his motion. We conclude not only that Montgomery has sufficiently shown a financial inability to pay the required filing fees, *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991) (citations omitted), but that his appeal contains a "reasoned, nonfrivolous argument on the law and facts in support of the issue[] raised on appeal," *Rolland v. Primesource Staffing, L.L.C.*, 497 F.3d 1077, 1079 (10th Cir. 2007) (citations omitted). Nevertheless, we affirm the district court's dismissal for failure to state a claim.