FILED
United States Court of Appeals
Tenth Circuit

April 24, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CANDACE SGAGGIO,

Plaintiff - Appellant,

v.

JOHN SUTHERS, in his official and individual capacity; DON KNIGHT, in his official and individual capacity; DAVID GEISLINGER, in his official and individual capacity; RICHARD SKORMAN, in his official and individual capacity; YOLANDA AVILA, in her official and individual capacity; JILL GAEBLER, in her official and individual capacity; BILL MURRAY, in his official and individual capacity; TOM STRAND, in his official and individual capacity; WAYNE WILLIAM, in his official and individual capacity; MARCUS ALLEN, in his official and individual capacity; TYLER BRESSON, in his official and individual capacity; NICHOLAS HAMAKER, in his official and individual capacity; ERIC ANDERSON, in his official and individual capacity; VINCE NISKI, Chief of Police, in his official and individual capacity; CITY OF COLORADO SPRINGS; JOHN DOES, 1-50,

Defendants - Appellees.

No. 22-1138
(D.C. No. 1:21-CV-00163-RBJ)
(D. Colo.)

ORDER AND JUDGMENT*

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of

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Before **TYMKOVICH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

Candace Sgaggio sued Officer Marcus Allen under 42 U.S.C. § 1983, alleging violations of her First and Fourth Amendment rights. The district court dismissed her claims and denied her motion to reconsider. She appeals,[1] and we affirm.

I. Background

Ms. Sgaggio's amended complaint alleged the following facts. She owns property in Colorado Springs, Colorado, used by Green Faith Church. Officer Allen went to the church around 8:30 one night looking for a missing at-risk person.[2] As he walked to the door, he told a church member to wait in his car "for a minute." R. at 94. The man "didn't want to cause any problems," so he complied and ended up waiting in his car for at least thirty minutes. *Id.*

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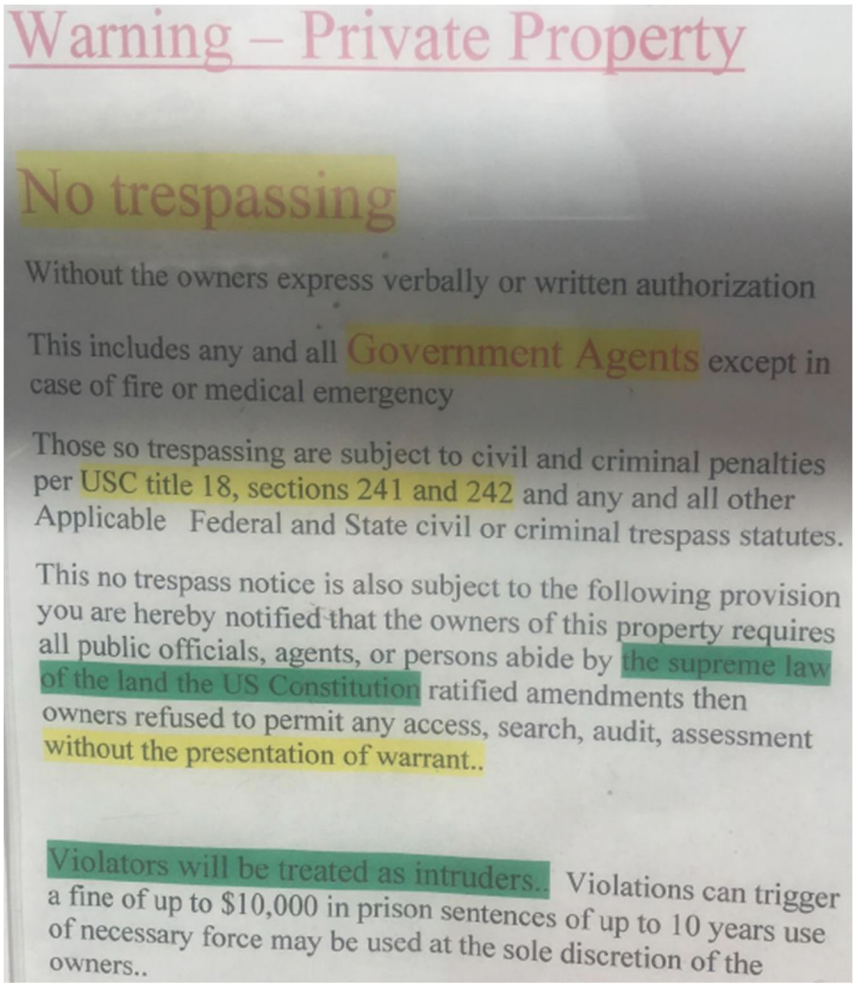
this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Ms. Sgaggio represents herself, so we construe her filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

[2] Ms. Sgaggio did not allege in her amended complaint that Officer Allen was looking for a missing person. She submitted the information after the district court dismissed her complaint. We mention the reason for Officer Allen's presence at the church to provide context.

Officer Allen approached the closed, locked door and demanded that it be opened, but the man running the door refused to let him in. To the side of the door, the owners had posted this notice:



Warning – Private Property

No trespassing

Without the owners express verbally or written authorization

This includes any and all Government Agents except in case of fire or medical emergency

Those so trespassing are subject to civil and criminal penalties per USC title 18, sections 241 and 242 and any and all other Applicable Federal and State civil or criminal trespass statutes.

This no trespass notice is also subject to the following provision you are hereby notified that the owners of this property requires all public officials, agents, or persons abide by the supreme law of the land the US Constitution ratified amendments then owners refused to permit any access, search, audit, assessment without the presentation of warrant..

Violators will be treated as intruders.. Violations can trigger a fine of up to $10,000 in prison sentences of up to 10 years use of necessary force may be used at the sole discretion of the owners..

R. at 91.

Ms. Sgaggio received a call from the man running the front door. He said, "There's a cop here. He's . . . telling me I have to open the door. The officer also arrested a member in the parking lot. Church members are freaking out. The cop won't tell us why he is here. He just wants in." R. at 85. In response to Officer

Allen's actions, the church was "placed on lock down." R. at 86. And at some point, Ms. Sgaggio got "into a verbal altercation with" Officer Allen. *Id.*

Officer Allen's supervisor showed up. Ms. Sgaggio's husband told the supervisor that Officer Allen had been "waving members off." R. at 92. The supervisor allowed the man who Officer Allen told to wait in his car to go inside.

Based on these allegations, Ms. Sgaggio raised the following claims:

1. Officer Allen violated her Fourth Amendment right to be free from unreasonable searches.

2. Officer Allen violated her Fourth Amendment right to be free from unreasonable seizures.

3. Officer Allen violated her First Amendment right to the free exercise of her religion.

4. Officer Allen retaliated against her for engaging in activity protected by the First Amendment (the exercise of her religion).[3]

[3] In addition to these four claims, Ms. Sgaggio's complaint alleged Officer Allen violated her First Amendment right to free association with her husband, retaliated against her for associating with her husband, and retaliated against her for filing a prior lawsuit against city officials. Her complaint also included claims against other officers based on events occurring about three months after her encounter with Officer Allen, and claims against the police chief, elected officials, and the City of Colorado Springs. The district court dismissed all her claims. Ms. Sgaggio's appellate brief does not raise challenges as to all her original claims, however. An opening brief must contain the "appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(8)(A). "Scattered statements in the appellant's brief are not enough to preserve an issue for appeal." *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1134 n.4 (10th Cir. 2004). By these standards, Ms. Sgaggio's appellate brief adequately argues in support of only the four claims against Officer Allen we discuss here. She has waived any arguments supporting other claims or relating to other defendants. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

Officer Allen moved to dismiss the claims under Federal Rule of Civil Procedure 12(b)(6), asserting qualified immunity.

The district court granted the motion to dismiss after concluding Ms. Sgaggio failed to allege facts showing that Officer Allen violated her constitutional rights. According to the district court, Officer Allen did not search Ms. Sgaggio's property because he never intruded on a constitutionally protected thing or space. The district court further concluded Officer Allen did not seize either Ms. Sgaggio or her property during his visit to the church. And, the district court determined, Officer Allen did not burden Ms. Sgaggio's exercise of her religion or retaliate against her for practicing her religion.

Ms. Sgaggio moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). Along with the motion, she submitted video recordings that depicted Officer Allen on the church's porch and in the parking lot. In one of the recordings, Officer Allen's supervisor explained that police were looking for a missing at-risk adult who reportedly had been last seen at the church. The district court concluded that the video recordings showed no clear error in its dismissal order, and it denied the Rule 59(e) motion.

II. Discussion

A. Dismissal Under Rule 12(b)(6)

When a defendant asserts qualified immunity in a motion to dismiss, the plaintiff must show (1) that the defendant violated a constitutional right and (2) that

the constitutional right was clearly established. *See Doe v. Woodard*, 912 F.3d 1278, 1289 (10th Cir. 2019).

We review the district court's dismissal de novo. *See id.* at 1288. At this stage in the litigation, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for constitutionality." *Thompson v. Ragland*, 23 F.4th 1252, 1256 (10th Cir. 2022) (brackets and internal quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). This standard requires the plaintiff to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In reviewing the district court's dismissal order under Rule 12(b)(6), we do not consider the videos Ms. Sgaggio submitted with her Rule 59(e) motion, for we "generally limit our review on appeal to the record that was before the district court when it made its decision." *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 648 (10th Cir. 2008).

1. Fourth Amendment Search

The Fourth Amendment prohibits unreasonable searches and seizures. *Cnty. of L.A. v. Mendez*, 137 S. Ct. 1539, 1546 (2017). Government conduct amounts to "a Fourth Amendment search *either* when it infringes on a reasonable expectation of privacy *or* when it involves a physical intrusion (a trespass) on a constitutionally protected space or thing (persons, houses, papers, and effects) for the purpose of

obtaining information." *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (internal quotation marks omitted).

Ms. Sgaggio contends Officer Allen's conduct qualifies as a search because, in her view, she retained "an expectation of privacy on the entire spiritual campus." Aplt. Br. at 12. But her complaint does not allege facts to show such an expectation was *reasonable*. "When the police come on to private property to conduct an investigation and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment." *United States v. Hatfield*, 333 F.3d 1189, 1194 (10th Cir. 2003) (brackets, ellipsis, and internal quotation marks omitted). Ms. Sgaggio's complaint provides no reason to think the church's parking lot was not open to the public when Officer Allen entered it. It does not allege, for example, "that the lot was fenced, that a gate prevented unauthorized entry, or even that signs restricted entry to the parking lot." *United States v. Ludwig*, 10 F.3d 1523, 1526 (10th Cir. 1993). Nor does it allege facts that could show the porch was not open to the public when Officer Allen walked onto it and sought to enter the church.

That brings us to the core of Ms. Sgaggio's unlawful-search theory: the no-trespassing sign. According to Ms. Sgaggio, the no-trespassing sign near the church's door revoked any implied license for Officer Allen to knock on the door and try to gain entry without a warrant. She distinguishes the sign in this case from those discussed in *United States v. Carloss*, where no-trespassing signs posted around a house and on a front door did not convey "to an objective officer that he could not

approach the house and knock on the front door seeking to have a consensual conversation with the occupants." 818 F.3d 988, 990 (10th Cir. 2016). Unlike the signs in *Carloss*, she argues, the sign here conveyed to officers that they "need a warrant to even be on the property." Aplt. Br. at 9. We are not persuaded.

The language and location of the no-trespassing sign belie Ms. Sgaggio's interpretation of it. The sign informs public officials that the owners of the property refuse "to permit any access, search, audit, [or] assessment without the presentation of [a] warrant." R. at 91. The location of the sign—next to the front door—implies that its prohibitions apply to the inside of the church. After all, in most (or perhaps all) cases, the sign would be read from the porch itself, and the complaint contains no allegations that the reader would have passed similar signs before entering the parking lot or the porch. And so a reasonable officer reading the sign would have no reason to think the owners of the property require public officials to have a warrant merely to enter the parking lot or the porch.

Still, Ms. Sgaggio says, Officer Allen must have conducted a search because the reason for his trip to the church was to look for an at-risk adult. The first problem with this argument is that it relies on information absent from the amended complaint—that police were looking for an at-risk adult. For that reason, we do not consider the information in our review of the district court's dismissal order.

Moreover, Ms. Sgaggio's argument confuses a common, everyday meaning of *search* for the legal meaning of that term in Fourth Amendment contexts. We have already concluded that Officer Allen's actions did not amount to a search for

purposes of the Fourth Amendment. That conclusion remains sound even if he took those actions while looking—or, in the colloquial sense, searching—for a missing person. *See Florida v. Jardines*, 569 U.S. 1, 9 n.4 (2013) (recognizing that an officer's purpose of discovering information while engaging in "permitted conduct does not cause it to violate the Fourth Amendment").

In sum, Ms. Sgaggio lacked a reasonable expectation of privacy in the church's parking lot and porch, and by entering those areas, Officer Allen did not conduct a search under the Fourth Amendment.

2. Fourth Amendment Seizure

That Officer Allen did not conduct a search under the Fourth Amendment does not foreclose the possibility that he seized Ms. Sgaggio's property. *See Soldal v. Cook Cnty.*, 506 U.S. 56, 68 (1992). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

At the outset, we set aside the statement in Ms. Sgaggio's complaint that Officer Allen "detained individuals inside the church." R. at 88. Our review requires us to disregard "conclusory allegations." *Bledsoe v. Carreno*, 53 F.4th 589, 606 (10th Cir. 2022). As we read it, the complaint *argues* that Officer Allen's actions (or perhaps his mere presence) outside the church amounted to a detention of the people inside because the no-trespassing sign banned him from the entire property. As we explained, however, the sign did no such thing. And Ms. Sgaggio's complaint lacks facts that could otherwise support a conclusion that Officer Allen seized anyone

inside the church. It does not allege, for example, Officer Allen ever entered the church or ordered anyone inside to stay put.

Along the same lines, we cannot attribute the church's "lock down" to Officer Allen. "Governmental defendants normally can be held responsible for a private decision only when they have exercised coercive power or have provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1116 (10th Cir. 2008) (internal quotation marks omitted). The complaint lacks facts supporting a reasonable inference that Officer Allen encouraged the decision to lock down the church or caused it through coercion.

Turning to the complaint's well-pleaded allegations, we conclude they do not show that Officer Allen seized Ms. Sgaggio's property. Arguing otherwise, Ms. Sgaggio highlights Officer Allen told another church member to wait in his car. But that instruction did not meaningfully interfere with Ms. Sgaggio's possessory interest in her property; indeed, it did not prevent her from accessing the property in any way. *Cf. United States v. Shrum*, 908 F.3d 1219, 1229–30 (10th Cir. 2018) (concluding officers seized the defendant's home when they secured his home and denied him access to it). At most, the complaint alleges Officer Allen prevented *someone else*—the man he told to wait in his car—from entering the church. Indeed, Officer Allen himself was excluded from the church, demonstrating that church staff retained control over it. And contrary to Ms. Sgaggio's argument, the allegation that

Officer Allen told one man to wait in his car does not show that he "took control of the entire parking lot." Aplt. Br. at 27.

Nor does Ms. Sgaggio's complaint allege facts showing Officer Allen seized her person. Not every interaction between an officer and a citizen amounts to a seizure. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991). A consensual encounter is not a seizure. *United States v. Spence*, 397 F.3d 1280, 1282 (10th Cir. 2005). Ms. Sgaggio reasons that because her no-trespassing sign says that any encounter on her property "would have to involve a warrant," Aplt. Br. at 10, she necessarily did not consent to the interaction with Officer Allen on the property. But again, the no-trespassing sign did not prohibit officers from entering the parking lot or porch without a warrant. And Ms. Sgaggio makes no other argument that Officer Allen seized her person by engaging in conduct that would have communicated to a reasonable person that she was not free to decline his requests "or otherwise terminate the encounter." *Bostick*, 501 U.S. at 439.

3. First Amendment Free Exercise

To state a free-exercise claim, Ms. Sgaggio had to allege facts showing the government placed a burden on the exercise of her religious beliefs or practices. *See Fields v. City of Tulsa*, 753 F.3d 1000, 1009 (10th Cir. 2014). The government burdens the exercise of religion if its "challenged action is coercive or compulsory." *Id.* (internal quotation marks omitted).

We agree with the district court that Ms. Sgaggio does not allege facts that could show Officer Allen burdened her free exercise of religion. Ms. Sgaggio has

not advanced any contrary availing argument. Ms. Sgaggio claims Officer Allen threatened her with arrest. To be sure, imposing the threat of arrest on one's religious practice would amount to coercion. *See Janny v. Gamez*, 8 F.4th 883, 918 (10th Cir. 2021) (recognizing clear coercion in "a choice between religious activities and jail"). But Ms. Sgaggio's complaint does not allege facts supporting a reasonable inference that Officer Allen threatened her with arrest. Ms. Sgaggio insists that, when Officer Allen told another member to wait in his car, this amounted to a threat that she would "be next." Aplt. Br. at 22. Under the circumstances here, however, we do not think it is reasonable to infer a threat against Ms. Sgaggio from Officer Allen's interaction with the other member.

4. Retaliation for Activity Protected by the First Amendment

To state a claim that Officer Allen retaliated against her for exercising her First Amendment rights, Ms. Sgaggio had to allege facts showing (1) that she engaged in constitutionally protected activity, (2) that Officer Allen's actions caused her to suffer an injury that would chill a person of ordinary firmness from continuing to engage in the protected activity, and (3) that Officer Allen's actions were substantially motivated as a response to her protected conduct. *See Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007).

Ms. Sgaggio argues Officer Allen retaliated against her for practicing her religion. We disagree. Officer Allen's actions did not cause her "to suffer an injury that would chill a person of ordinary firmness from continuing to" practice her religion. *Id.* Ms. Sgaggio disputes that she could "just continue to engage in [her]

spiritual activities" after Officer Allen "detained every single person" in the church. Aplt. Br. at 23. But, as discussed, the complaint does not allege facts showing Officer Allen actually detained anyone inside the church.

B. Denial of the Rule 59(e) Motion

We review the district court's decision to deny Ms. Sgaggio's Rule 59(e) motion for an abuse of discretion. *See Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1228 (10th Cir. 2016). We will not reverse unless we "have a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice." *Id.* (internal quotation marks omitted).

A district court may grant a Rule 59(e) motion (1) to account for an intervening change in the controlling law, (2) to consider previously unavailable evidence, or (3) to correct clear error or prevent manifest injustice. *See Servants of the Paraclete v. Doe*, 204 F.3d 1005, 1012 (10th Cir. 2000). A Rule 59(e) motion is not the proper vehicle "to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.*

In her Rule 59(e) motion, Ms. Sgaggio argued the newly submitted videos were "undisputable evidence" that police secured her building. R. at 373. On appeal, however, she does not dispute the district court's finding that the videos were previously available to her. In any event, the videos do not undermine the dismissal order. As the district court said, Officer Allen appears "calm, polite, and non-confrontational." Suppl. R. at 34. The videos do not suggest he secured

Ms. Sgaggio's building, nor do they otherwise bolster her claims. The district court did not abuse its discretion when it denied Ms. Sgaggio's Rule 59(e) motion.

III. Conclusion

We affirm the district court's judgment.

Entered for the Court

Veronica S. Rossman
Circuit Judge