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NO. COA10-274

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

ROBERT G. MAYNARD,
Individually and as
Guardian of the Person
of Tiffany Maynard Speaks,
Plaintiff-Appellant,

v.

Davidson County
No. 09 CvS 00152

RONNIE BOWLES, Individually
and as a Lieutenant in the
Davidson County Sheriff's
Department; DAVID GRICE,
Individually and as Sheriff
of Davidson County; and
CINCINNATI INSURANCE COMPANY,
Defendants-Appellees.

Appeal by Plaintiff from order entered 7 January 2010 by Judge Kevin M. Bridges in Superior Court, Davidson County. Heard in the Court of Appeals 28 September 2010.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for Plaintiff-Appellant.

Frazier, Hill & Fury, RLLP, by William L. Hill and Torin L. Fury, for Defendants-Appellees.

McGEE, Judge.

Robert G. Maynard (Plaintiff), filed a complaint on 13 January 2009, asserting claims for false arrest, false imprisonment, malicious prosecution, unlawfully removing ward from guardian, and recovery under sheriff's bond. Plaintiff alleged that Lieutenant

Ronnie Bowles (Lt. Bowles) of the Davidson County Sheriff's Department, "illegally restrained" Plaintiff and "caused . . . criminal proceedings [to be instituted] against [P]laintiff."

Deputy Dan Parks (Dep. Parks), of the Davidson County Sheriff's Office, submitted an affidavit recounting the following events. Dep. Parks responded to a call at Plaintiff's residence on 14 August 2007. A dispatcher for the Sheriff's Office told Dep. Parks that an individual named Renzy Speaks (Mr. Speaks) had requested assistance in picking up Mr. Speaks' wife (Mrs. Speaks) and Mrs. Speaks' child, from Plaintiff's residence. Plaintiff is the father of Mrs. Speaks.

Dep. Parks met with Mr. Speaks, who told him that Mrs. Speaks and her child were being held against their will. Dep. Parks told Mr. Speaks to wait in his vehicle while Dep. Parks discussed the matter with Mrs. Speaks. Dep. Parks spoke with Mrs. Speaks and her mother, Kathy Maynard (Mrs. Maynard). Mrs. Speaks told Dep. Parks that she was nineteen years old and wanted to live with her husband, but she did not want to "make her mother mad." Mrs. Maynard gave Mrs. Speaks permission to leave, and Mrs. Speaks went inside to collect her child.

As Mrs. Speaks and her child were getting into Mr. Speaks' vehicle, a van entered the driveway at a high speed. The van stopped and Plaintiff exited, yelling at Mr. Speaks to "get the hell off his property." Dep. Parks informed Plaintiff that he was conducting an investigation, that Mr. Speaks "was with [him]," and that Mr. Speaks could stay until Dep. Parks completed his

investigation. Plaintiff was "yelling in an irate and threatening manner[,]" and told Dep. Parks to leave his property. Dep. Parks called for backup assistance.

Dep. Parks explained to Plaintiff that he had been told Mrs. Speaks and her child were being held against their will and that Dep. Parks could not leave until he was satisfied that "the situation could be resolved safely." Plaintiff did not calm down, he "became red in the face and continued yelling, cursing, and flailing his arms." Plaintiff yelled that he had custody of Mrs. Speaks and her daughter, and that "they were not going to leave his property." Mrs. Maynard brought Dep. Parks documents that Plaintiff contended were proof of his custody of Mrs. Speaks and her daughter.

Dep. Parks attempted to read the papers and ordered Plaintiff to "step back" while he read. Plaintiff complied but continued yelling and cursing. Plaintiff approached Dep. Parks several times and was ordered back each time. Lt. Bowles and Sergeant Billy Medford (Sgt. Medford) arrived in response to Dep. Parks' call for backup and observed Plaintiff yelling at Dep. Parks.

As Dep. Parks attempted to explain the situation to Lt. Bowles and Sgt. Medford, Plaintiff approached the officers, yelling and cursing at them. Dep. Parks again told Plaintiff to step back and informed Plaintiff that he would not be warned again. Plaintiff complied, but said "[t]his is my G-d--- house and I will do as I please." Plaintiff once more approached the officers in an aggressive manner and put his hand in his right pocket.

The officers then decided to arrest Plaintiff for "resisting, delaying, and obstructing an officer." Lt. Bowles and Dep. Parks approached Plaintiff and Lt. Bowles ordered Plaintiff to take his hand out of his pocket. Plaintiff eventually complied, and Lt. Bowles approached Plaintiff and placed him under arrest. The officers found a pocket knife in Plaintiff's pocket.

According to Plaintiff's deposition testimony, Plaintiff was arguing with Dep. Parks and attempting to show him papers related to Plaintiff's custody of Mrs. Speaks. Plaintiff testified that, when Dep. Parks ordered him to step back, he complied and was then placed under arrest by Lt. Bowles. When asked if he had cursed Dep. Parks before being arrested, Plaintiff answered: "Seemed to me like I did. . . . I told him to get off my d--- property." Plaintiff testified that he did not have his hand in his pocket, but was instead holding a drink and a cigarette in either hand. In Plaintiff's answer to Defendant's interrogatories, Plaintiff stated he was told twice to "get back" by Dep. Parks.

Plaintiff was placed in Dep. Parks' vehicle and was driven to the magistrate's office. Dep. Parks swore to an affidavit attesting that, based on his observations, he had probable cause to arrest Plaintiff for resisting, delaying, and obstructing an officer. The magistrate issued an order for Plaintiff's arrest. The charges against Plaintiff were later dismissed on 18 May 2008.

Plaintiff filed this action, naming Lt. Bowles and Davidson County Sheriff David Grice (Sheriff Grice), in their official and individual capacities, as Defendants, along with Cincinnati

Insurance Company, as holder of a public official bond covering Lt. Bowles and Sheriff Grice. Plaintiff did not name Dep. Parks as a defendant. Defendants filed a motion for summary judgment, along with the deposition testimonies of Mrs. Maynard, Mrs. Speaks, Mr. Speaks, and Plaintiff, and affidavits from Lt. Bowles, Lt. Robert Miller of the Davidson County Sheriff's Department, Sgt. Medford and Dep. Parks. The record does not reflect any filing on behalf of Plaintiff in opposition to Defendants' motion. The trial court entered an order on 7 January 2010, granting Defendants' motion for summary judgment. Plaintiff appeals, but makes no argument concerning the trial court's granting of summary judgment in favor of Defendants with respect to Plaintiff's claim for unlawfully removing ward from guardian. We therefore do not address that portion of the trial court's order.

Probable Cause

In ruling on a motion for summary judgment, the court must "view the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law."

Thomas v. Sellers, 142 N.C. App. 310, 312-13, 542 S.E.2d 283, 286 (2001) (citation omitted).

Plaintiff does not specifically argue that any facts are in dispute, but rather states "[b]ecause this is a summary judgment case, the statement of facts is set forth in the light most favorable to [P]laintiff." In Plaintiff's statement of the facts, he contends that his version of the events presents an issue of

fact because, if he had a drink in one hand and a cigarette in another, he could not have had a hand in his pocket. The bulk of Plaintiff's argument is directed to the issue of whether Lt. Bowles' arrest of Plaintiff was supported by probable cause.

The undisputed facts show that Plaintiff was arguing loudly with the officers and continued to approach them despite their orders to stay back while they looked over the papers presented to them. Although Plaintiff, in his brief, characterizes his behavior as "calmly approaching with papers," his deposition reveals that he admitted to yelling and cursing Dep. Parks and to approaching him with papers more than once. During her deposition, Mrs. Speaks testified that Plaintiff was ordered to step back twice and complied but continued to argue with the officers. Mrs. Speaks also testified during her deposition that Dep. Parks needed backup "for [her] dad" because Plaintiff was "stepping up to [Dep. Parks.]" Mrs. Speaks further testified that the officers repeatedly told Plaintiff to stay back, but that Plaintiff did not comply. Mrs. Maynard testified during her deposition that she heard the officers tell Plaintiff to step back several times.

The elements of resisting, delaying, or obstructing an officer have been identified as follows:

- [(1)] that the victim was a public officer;
- [(2)] that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
- [(3)] that the victim was discharging or attempting to discharge a duty of his office;

- [(4)] that the defendant resisted,
 delayed, or obstructed the victim in
 discharging or attempting to
 discharge a duty of his office; and
- [(5)] that the defendant acted willfully
 and unlawfully, that is
 intentionally and without
 justification or excuse.

State v. Washington, 193 N.C. App. 670, 679, 668 S.E.2d 622, 628 (2008). "An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence." N.C. Gen. Stat. § 15A-401(b) (1) (2009). "'The test for whether probable cause exists is an objective one - whether the facts and circumstances, known at the time, were such as to induce a reasonable police officer to arrest, imprison, and/or prosecute another.'" *Thomas*, 142 N.C. App. at 315, 542 S.E.2d at 287 (citation omitted). "'If the facts are admitted or established [probable cause] is a question of law for the court.'" *Id.* (citations omitted, alteration in the original).

Plaintiff argues that his case is similar to *Roberts v. Swain*, 126 N.C. App. 712, 487 S.E.2d 760 (1997). In *Roberts*, our Court held that a plaintiff was entitled to resist arrest where the officers conducting the arrest lacked sufficient knowledge to create probable cause supporting the arrest. *Id.* at 722, 487 S.E.2d at 767. In *Roberts*, we noted the following facts: the plaintiff was selling tickets outside of a basketball stadium; by statute criminalizing scalping, a person was authorized to sell tickets within a certain price range; the officers had no knowledge

of the price of the tickets; the officers arrested the plaintiff for scalping. *Id.* Our Court held that "under the facts evident to him at the time of [the] plaintiff's arrest, [the arresting officer] had no probable cause to arrest [the] plaintiff for violation of [the scalping statute] and [the] plaintiff had a clearly established right not to be arrested for this offense." *Id.*

Based on the crucial element of the arresting officers' knowledge, the present case is clearly distinguishable from *Roberts*. In the present case, Plaintiff was arrested for resisting, delaying, and obstructing an officer. Dep. Parks had been called to Plaintiff's residence regarding a dispute. While Dep. Parks was investigating the reasons for the dispute, Plaintiff grew agitated and angry. Plaintiff repeatedly approached Dep. Parks and the other officers. Dep. Parks ordered Plaintiff to step away numerous times. Despite the officers' orders, Plaintiff continued to approach, yelling and cursing the officers. Although there is a dispute in the facts as to whether Plaintiff put his hand in his pocket when he approached the last time, we find this issue immaterial in light of the undisputed facts. Based on the undisputed facts concerning the heated argument taking place while Dep. Parks was responding to the family dispute call, Lt. Bowles clearly had sufficient personal knowledge of Plaintiff's actions to believe there was probable cause to arrest Plaintiff for resisting, delaying, and obstructing. Therefore, we hold that the totality of the circumstances surrounding Plaintiff's arrest "were such as to

induce a reasonable police officer to arrest" Plaintiff. *Thomas*, 142 N.C. App. at 315-16, 542 S.E.2d at 287 (finding arrest for resisting, delaying, and obstructing supported by probable cause where arrestee refused to comply with an officer's lawful attempts to reclaim property pursuant to a court order). Because Plaintiff's arrest was supported by probable cause, Defendants were entitled to summary judgment as to this issue.

Plaintiff also asserted a claim for malicious prosecution based upon his arrest. "'[T]o maintain an action for malicious prosecution, the plaintiff must demonstrate that the defendant (1) instituted, procured or participated in the criminal proceeding against [the] plaintiff; (2) without probable cause; (3) with malice; and (4) [that] the prior proceeding terminated in favor of [the] plaintiff.'" *Thomas*, 142 N.C. App. at 314, 542 S.E.2d at 287 (citation omitted). In light of our discussion above, Plaintiff has failed to show a genuine issue of material fact as to whether Lt. Bowles lacked probable cause to arrest Plaintiff for resisting, delaying, and obstructing. Further, Plaintiff failed to allege any malice on the part of Lt. Bowles. Therefore, the trial court did not err in granting summary judgment in favor of Defendants as to this issue.

Plaintiff also contends the trial court erred in granting summary judgment to Defendants Sheriff Grice and Cincinnati Insurance Company. However, Plaintiff's claims against Sheriff Grice and Cincinnati Insurance Company are derivative claims based on the liability of Lt. Bowles. Therefore, because we have held

that summary judgment in favor of Lt. Bowles was proper, we hold that summary judgment in favor of Defendants Sheriff Grice and Cincinnati Insurance Company was also proper.

Affirmed.

Judges JACKSON and BEASLEY concur.

Report per Rule 30(e).