FILED
United States Court of Appeals
Tenth Circuit

February 13, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TERRY MARGHEIM,

Plaintiff - Appellant,

v.

KENNETH R. BUCK, Weld County D.A.; EMELA BULJKO, Weld County Deputy District Attorney; GREELEY POLICE CHIEF; JOHN BARBER; STEPHEN PERKINS; MR. ELLIS, unknown named employees of Greeley Police Department,

Defendants - Appellees.

No. 18-1138
(D.C. No. 1:12-CV-01520-WJM-NYW)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **PHILLIPS**, and **EID**, Circuit Judges.

This case stems from a suit by Mr. Terry Margheim against a district attorney, a deputy district attorney, and various police officers. Mr.

* Oral argument would not materially aid our consideration of the appeal, so we have decided the appeal based on the briefs. *See* Fed. R. App. P. 34(a)(2); Tenth Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But our order and judgment may be cited if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); Tenth Cir. R. 32.1(A).

Margheim initially asserted claims for false arrest, false imprisonment, supervisory liability, and municipal liability. The district court dismissed these claims but allowed Mr. Margheim to amend the complaint by asserting only a claim of malicious prosecution against the deputy district attorney. In a prior appeal, we concluded that the deputy district attorney was entitled to qualified immunity on the claim of malicious prosecution. Given this conclusion, we remanded for the district court to dismiss the claim against the deputy district attorney. The district court complied and entered judgment for all of the defendants.

Mr. Margheim then requested appointment of counsel and moved to alter or amend the judgment. The district court declined to appoint counsel and denied the motion to alter or amend the judgment. We affirm.

On the request to appoint counsel, Mr. Margheim argued that he needed an attorney to petition for a writ of certiorari from the United States Supreme Court. The district court declined to appoint counsel, and we review that ruling for an abuse of discretion. *Rachel v. Troutt*, 820 F.3d 390, 397 (10th Cir. 2016). In conducting this review, we consider the district court's reasoning. The court assumed that Mr. Margheim was requesting an attorney to seek certiorari in his earlier appeal. For that appeal, however, the time to seek certiorari had passed roughly seven months before the district court denied his request. Given expiration of the deadline, the district court's reasoning was correct.

The defendants point out that Mr. Margheim might have been referring to a petition for a writ of certiorari in the current appeal. If so, however, a petition would have been premature when Mr. Margheim sought counsel. It is only now (with this order and judgment) that there is a decision for the Supreme Court to consider on certiorari review. So the district court did not err in declining to appoint counsel.

The court not only declined to appoint counsel but also denied the motion to alter or amend the judgment, concluding that Mr. Margheim had waited too long to reassert his claims for false arrest and false imprisonment. We agree with the district court.

For the claims of false arrest and false imprisonment, Mr. Margheim included theories of supervisory and municipal liability. The district court rejected these theories based on an absence of personal participation or supervisory liability. Mr. Margheim then reasserted these claims through a motion to alter or amend the judgment. The district court denied relief based on the absence of a constitutional injury. We agree with the district court's reasoning.

Mr. Margheim also insists that the district court should not have dismissed the claim of malicious prosecution.[1] We need not decide the

[1] Mr. Margheim also contends that our court erred in the prior appeal. But our panel is bound by the earlier panel decision. *See, e.g., Vehicle Mkt. Res., Inc. v. Mitchell Int'l, Inc.*, 839 F.3d 1251, 1256 (10th Cir. 2016)

standard of review because Mr. Margheim's argument would fail under any standard. The district court dismissed this claim only because our court had rejected Mr. Margheim's argument in his earlier appeal. Our issuance of the mandate in the prior appeal required the district court to dismiss this claim. *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998). So the district court did not err in dismissing the claim.

Affirmed.[2]

Entered for the Court

Robert E. Bacharach
Circuit Judge

("After an appeal, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal." (internal quotation marks omitted)).

[2] We grant Mr. Margheim's motion for leave to proceed in forma pauperis.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 12-cv-1520-WJM-NYW

TERRY MARGHEIM,

Plaintiff,

v.

EMELA BULJKO, Weld County Deputy District Attorney,

Defendant.

ORDER DENYING POST-JUDGMENT MOTION

Before the Court is a motion from *pro se* Plaintiff Terry Margheim ("Margheim") titled "F.R.C.P. Rule 59(e) [¶] Leave to Proceed [¶] Appointment of Counsel" ("Rule 59 Motion"). (ECF No. 160.) This motion contains requests for various independent forms of relief.

Familiarity with this Court's prior orders (particularly ECF Nos. 57 & 126[1]) and the Tenth Circuit's opinion, *Margheim v. Buljko*, 855 F.3d 1077 (10th Cir. 2017), is presumed. For the reasons discussed below, these requests are denied.

A. Requests Related to Supreme Court Review

On April 28, 2017, the Tenth Circuit issued its opinion reversing this Court's denial of summary judgment. *See id.* at 1089–90. The Tenth Circuit issued its mandate on May 26, 2017. (ECF No. 150.) On June 14, 2017, the Court ordered final judgment to enter in favor of Defendant Emela Buljko ("Buljko"). (ECF No. 152.) The Clerk

[1] Also available at 2016 WL 931189 (D. Colo. Mar. 11, 2016).

entered final judgment the following day, June 15, 2017. (ECF No. 153.) Soon after, Margheim's attorney, appointed from this Court's *pro bono* panel, moved to withdraw, and the Court granted that motion. (ECF Nos. 154–59.)

In his Rule 59 Motion, filed July 3, 2017, Margheim states that he intended to petition the United States Supreme Court for a writ of certiorari and he "believes this court [by entering final judgment] has divested the Supreme Court of jurisdiction." (ECF No. 160 at 1.) He therefore requests that the Court vacate the final judgment.

As Buljko pointed out in her response brief (*see* ECF No. 162 ¶ 10), a petition for writ of certiorari is not affected by this Court's final judgment. Rather, a party may petition for certiorari within 90 days from the date of the order the party seeks to challenge. *See* U.S. Sup. Ct. R. 13. In Margheim's case, then, he had until July 27, 2017 (90 days from the Tenth Circuit's order). Thus, the premise of Margheim's request for relief—that this Court's judgment affects his ability to seek a writ of certiorari—is incorrect, and so this request is denied.

Margheim also requests appointment of an attorney from the *pro bono* panel to assist him with his certiorari petition. The deadline to file the petition has long passed and so that request is denied as moot.

B. Request for Reconsideration of False Arrest Ruling

This case started as a § 1983 false arrest/imprisonment case. In July 2013, the Magistrate Judge recommended that this claim be dismissed as time-barred in light of *Wallace v. Kato*, 549 U.S. 384, 389 (2007). In *Wallace*, the Supreme Court held that claims for false arrest and false imprisonment are equivalent because both assert "detention without legal process," and such a claim accrues when legal process occurs

(assuming it does) such as through a preliminary hearing. *Id.* at 389–92. If legal process occurs, then any continuing "unlawful detention" becomes the basis of the "entirely distinct tort of malicious prosecution," which is characterized by "*wrongful institution* of legal process." *Id.* at 390 (internal quotation marks omitted; emphasis in original).

Here, the arrest of which Margheim complains took place pursuant to a court-issued warrant on May 7, 2010. (*See* ECF No. 126 at 4.) Thus, legal process preceded his arrest, and so, per *Wallace*, the Magistrate Judge reasoned that "the plaintiff's false arrest and false imprisonment claims against Buljko accrued on the date of his arrest [May 7, 2010], and they are barred by the [applicable two-year] statute of limitation," given that Margheim did not file suit until June 12, 2012. (ECF No. 38 at 9.) In August 2013, the Court adopted the Magistrate Judge's recommendation and dismissed the case with prejudice. (ECF No. 41 at 6–10, 12.)

On December 13, 2013, Margheim moved for Rule 60(b) relief from judgment. (ECF No. 45.) Seven days later, the Tenth Circuit issued *Myers v. Koopman*, 738 F.3d 1190 (10th Cir. 2013), which held that a claim for malicious prosecution should not be recharacterized as one for false arrest, because the statute-of-limitations accrual date is much later for malicious prosecution (namely, the date of favorable termination of criminal proceedings). *Id.* at 1194. This Court therefore revisited Margheim's complaint and concluded that his cause of action (which was generically styled "Fourth Amendment") should have been construed as a malicious prosecution claim. (ECF No. 57 at 6–7.) So construed, the claim was timely because Margheim's prosecution was dismissed on December 12, 2011, making Margheim's complaint timely. The Court

therefore granted Margheim's Rule 60(b) motion as to a claim of malicious prosecution.

Following discovery, the Court denied summary judgment to Buljko, including a denial of qualified immunity. (ECF No. 126.) That denial entitled Buljko to immediately appeal, which she did. (ECF No. 129.) The Tenth Circuit ultimately reversed, explicitly holding that while Buljko had forfeited the winning argument on this issue, the court would just simply disregard that forfeiture, and that, as a consequence, the court would reach the winning argument anyway. *Margheim*, 855 F.3d at 1088–89. That winning argument was the malicious prosecution element of "favorable termination": "To count as favorable, the termination must in some way indicate the innocence of the accused." *Id.* at 1089 (internal quotation marks omitted). Here, Margheim's criminal prosecution was dismissed after he won a motion to suppress the incriminating evidence (narcotics on his person), having convinced the state court judge that the police were never lawfully on Margheim's premises when they encountered him, arrested him on a separate warrant, and discovered the narcotics during a search incident to arrest. (*See* ECF No. 126 at 5–7.) The Tenth Circuit found that suppression, in these circumstances, did not qualify as indicative of innocence, and therefore did not qualify as favorable termination for purposes of a malicious prosecution claim. *Margheim*, 855 F.3d at 1089–90.

In his current Rule 59 motion, Margheim reaches all the way back to this Court's August 2013 order adopting the Magistrate Judge's recommendation that his false arrest/imprisonment claim should be dismissed as time-barred. (ECF No. 160 at 3–5.) He argues primarily from *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017). In *Manuel*, the Supreme Court faced the Seventh Circuit's position, contrary to various other circuits,

that once a person claiming false arrest or imprisonment receives legal process, any claim for ensuing detention must be brought under the Due Process Clause, not the Fourth Amendment. *Id.* at 916. The Supreme Court rejected this approach, holding that the Fourth Amendment is the proper authority to invoke when a plaintiff alleges that he or she was detained based on legal process that was tainted by false evidence. *Id.* at 918–20. The Supreme Court left it to lower courts, for now, to "determine the elements of, and rules associated with, an action seeking damages." *Id.* at 920.

Margheim argues that *Manuel* "calls into question circuit precedent on just how far into the pretrial context the protections of the Fourth Amendment reach when the probable cause determination is tainted." (ECF No. 160 at 4.) He further argues that "[t]he institution of 'legal' process that 'shifts' the analysis [from false arrest/imprisonment to malicious prosecution] must be untainted by 4th Amendment violations in order to comply with *Manuel*. The taint in the claims at bar was not remove[d] prior to the granting of the motion to suppress on 12/1/2011." (*Id.*) Margheim seems to be saying that he still has a false arrest/imprisonment claim to litigate, which this Court erroneously dismissed in August 2013.

Margheim, in essence, asks the Court to reconsider a nearly five-year-old order. Although he includes his request within a Rule 59(e) motion, this is not simply a request to alter or amend the judgment. It is much closer to a Rule 60(b)(1) motion for relief from judgment based on mistake, but such motions must be brought within one year of the relevant order. *See* Fed. R. Civ. P. 60(c)(1). Obviously Margheim's motion falls far outside that deadline. And even if the one-year deadline does not strictly apply in this circumstance, the Court would nonetheless find in its discretion that Margheim's motion

is unreasonably untimely. His request for relief from the August 2013 order is therefore denied.[2]

C. "Supervisor/Municipal Liability"

Margheim states that Buljko, in her deposition, "admitted, 'We never had any formal training about it.' (relating to the filing of motions to revoke bond)." (ECF No. 160 at 5.) However, says Margheim, "Pro Bono counsel refused to argue Official Capacity claims." (*Id.*)

Even if Margheim could get past the many obstacles that prevent him from alleging a supervisory or municipal liability claim at this stage (the tardiness of the request; the fact that counsel's strategic litigation decisions usually bind their clients; the fact that Margheim previously named the Weld County District Attorney as a defendant and this Court dismissed him, *see* ECF No. 41 at 10–11; potential Eleventh Amendment immunity depending on precisely what party Margheim seeks to hold liable; and the

[2] Having now taken a second look at the August 2013 order, the Court finds that its ruling and the Magistrate Judge's recommendation were inaccurate as to their reasoning, although they reached the right outcome anyway. The Court ruled that the statute of limitations had run on the false arrest claim, but in truth his false arrest claim never accrued in the first place. Margheim was arrested pursuant to a warrant, so there was never a time when Margheim was detained without legal process. *See Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008) ("the issuance of an arrest warrant represents a classic example of the institution of legal process"). From the beginning, his claim was always malicious prosecution or nothing. And, in the Tenth Circuit, "favorable termination" is an element of malicious prosecution, which Margheim does not satisfy as a matter of law. *Margheim*, 855 F.3d at 1089–90. If Margheim means to argue that his arrest in May 2010 was on a bond-revocation warrant and that any detention justified by the drug charges was without legal process (*i.e.*, without determination of probable cause as to those drug charges) until his February 2011 preliminary hearing in the drug case (*see* ECF No. 163 at 1), he runs into other problems. To pursue a viable false arrest claim, he would need to argue that he was detained on the drug charges without probable cause. Clearly the officers had probable cause, even before any legal process confirmed it, because they found the drugs on Margheim's person during the search incident to his bond-revocation arrest. A court later ruled that the flawed bond-revocation warrant led the officers to a location where they should never have been, but that does not mean that they lacked probable cause to detain him on the drug charges based on all the circumstances known to them at the time.

high pleading standard for such claims), a supervisory or municipal liability claim would still require Margheim to demonstrate that he suffered a constitutional injury. The Tenth Circuit's opinion forecloses that, finding that he cannot satisfy the favorable termination element. Because he suffered no constitutional injury, there is no supervisor or municipal entity to hold liable as the moving force behind that injury. This request is denied.

D. Appointment of New Counsel

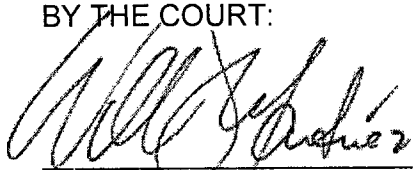
Margheim asks the Court to appoint new *pro bono* counsel to assist him with his various arguments. That request is moot given that his arguments fail.

* * *

For the reasons set forth above Margheim's Rule 59 Motion (ECF No. 160) is DENIED. The Clerk shall mail a copy of this order to Margheim at his address of record.

Dated this 20th day of March, 2018.

BY THE COURT:



William J. Martínez
United States District Judge

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

TERRY MARGHEIM,

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Defendants - Appellees.

No. 18-1138

ORDER

Before **BACHARACH**, **PHILLIPS**, and **EID**, Circuit Judges.

Mr. Margheim's petition for rehearing is denied. His motion for appointment of counsel or request for an extension of time is also denied.

The petition for rehearing en banc was transmitted to all the judges of the court who are in regular active service. As no member of the panel and no judge in regular

active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Additional material from this filing is available in the Clerk's Office.