06/29/21
MD

No. 21-149

IN THE SUPREME COURT OF THE UNITED STATES

Rodolfo Rivera Jr.

Petitioner,

v.

Officer John Granillo CSPD #3876

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Appeal Case No.
20-1133, (D.C. No. 1:17-CV-01667-KMT) (D.Colo.)

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I. Question[s] Presented For Review

The questions presented are whether the lower Court err in their decision granting Qualified Immunity and Probable Cause on grounds, which conflicts with this court, and other United States Court of Appeals decision on the same subject matter relying on ambiguous law.

Whether the lower court has departed from the accepted and usual course of judicial proceedings, misrepresenting and ignoring material facts of the case.

Whether the lower court is required to address issues raised by the plaintiff.

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V. Parties to the Proceeding

All parties appear in the caption of this case on the cover page.

VI. Corporate Disclosure Statement

There is no parent or publicly held company. Rules 14.1(b)(ii) and 29.6.

VII. Related Cases

Rivera v. Granillo, No. 20-1133, U.S. Court of Appeals for the Tenth Circuit.

Judgment entered April 5, 2021.

Rivera v. Granillo No. 17-cv-01667-KMT, U.S. District Court for the District of

Colorado. Judgment entered Mar. 13, 2020

Rivera v. Miller, No. 16-cv-25, El Paso County District Court Judgment entered

Mar 3, 2017

State of Colorado v. Rivera, No. 15M6879, El Paso County District Court. Judgment

Entered Feb 23, 2016.

VIII. Jurisdiction

This case arises for the same factual circumstances presented in all federal and state courts and is now before this court. It also involves the same parties, plaintiff Rodolfo Rivera Jr. and defendant Officer John Granillo.

This is an appeal from the 10th Circuit Court of Appeals Order and Judgment pursuant to Fed. R. App. P. Rule 36 which was entered on February 18, 2021, case No. 20-1133 (D.C. 1:17-CV-01667-KMT) (D. Colo.). See Appendix A.

The 10th Circuit Denied Petition for Rehearing (En Banc) on April 5, 2021. See Appendix B.

The United States Magistrate denied defendant's motion to dismiss and later granted defendant's motion for summary judgement entering an Order and Final Order on Mar 13, 2020, See Appendix C. and D

The El Paso County Fourth Judicial District Court awarded plaintiff damages on Mar 3, 2017, Case No. 16CV25 from complainant making false charges against plaintiff.

El Paso County 4th Judicial District Court Div. F entered an Order and Judgment on Feb 23, 2016 where a jury of 12 acquitted Plaintiff of all charges in Case No. 15M6879.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), timely filing this petition for a writ of certiorari within ninety days of the 10th Circuit's Order and Judgment.

IX. Constitutional and Statutory Provisions Involved

United States Constitution, Amendment IV:

The 4th Amendment of the United States Constitution provides the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:

The 14th Amendment of the United States Constitution provides that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

X. Summary of Facts

On Feb 18, 2021, case No. 20-1133, the lower court has entered an Order, granting defendant probable cause and qualified immunity relying on ambiguous law, which conflicts with the decisions of this Court and other United States Court of Appeal's on the same matter. (See App. A)

The lower court has departed from the accepted and usual course of judicial proceedings, misrepresenting and ignoring material facts of this case.

Both lower courts did not address Plaintiff's Excessive Force claims and the Bill of Cost claim.

On Mar 13, 2020, the lower district court issued an Order and a Final Judgment granting defendant's motion for Summary Judgment Case No 17-cv-01667-KMT. The lower district court also awarded defendant costs. The plaintiff has addressed this with the lower court in his Motion to Stay the district courts proceedings address Bill of Cost. The lower court denied this motion on July 24, 2020. In the court considered this matter 'Moot." Plaintiff also addressed this in his Petition for Rehearing (En Banc) which the lower court denied never addressing this matter.

XI. Reasons for Granting Petition

I. The lower Court Order and Judgment are appropriate for this Court's review; the lower court has entered a decision that conflicts with the decisions of this Court and other United States court of appeals on the same matter and relied on ambiguous law to render their decision.

On Feb 18, 2021, the lower court issued an Order and judgment

Denying plaintiff's appeal relying on ambiguous law, which conflicts with this court and other court of appeals decision on the same subject matter.

The lower Court's Order and Judgment states:

> "[P]robable cause is a matter of probabilities and common sense conclusions, not certainties." *United States v. Martin*, 613 F.3d 1295, 1302 (10th Cir. 2010) (brackets in original; internal quotation marks omitted). In addition, Granillo needed only "arguable probable cause, "given the assertion of qualified immunity. *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014) (internal quotation marks omitted)....

This is 'FALSE' the Courts no longer relies on Martin reasoning, See *Michigan v. Chesternut,* 486 U.S. 567, 108 S.Ct. 1975 (1988). Stating:

> In *Chesternut*, the Supreme Court took note of its dicta in *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) that a seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." 486 U.S. at 573. The Court stated that it had since "embraced" a different definition of "seizure": "[T]he police can be said to have seized an individual only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave". *Chesternut*, 486 U.S. at 573. The Court draws attention to the correct definition of "seizure" in light of its discovery of a recent Tenth Circuit case analyzing facts arguably similar to those in the instant case, and applying the *Terry* footnote's definition of "seizure". See *United States v. Martin*, 613 F.3d 1295 (10th Cir. 2010). There, the Tenth Circuit cited the *Terry* dicta for the proposition that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty if a citizen may we conclude that a 'seizure' has occurred" *Id.* at 1300. Because this definition was later rejected by the Supreme Court, the Tenth Circuit applies the correct dicta as articulated in *Chesternut*, the Court finds that the *Martin* opinion is an outlier that holds little authoritative value, See *United States v. VanMeter*, 278 F.3d 1156, 1162 (10th Cir. 2002) ("we follow an earlier, settled precedent over a subsequent derivation")". See *Stonecipher*, FN 3 and U.S. v. *Aragones* 2011 WL 13285699 FN 3.

On Pg. 2 of the lower Court's Order and Judgment, case No. 20-1133 the court acknowledges Defendant arrested Plaintiff on suspicion of assault and

harassment. In determining whether the defendant had probable cause to seize and arrested Plaintiff, this court must look into the defendant's actions prior to Plaintiff's seizure and arrest, due to the defendant's credibility issues having different version of the facts in his contradictory reports and deposition testimony, which plaintiff raised in both lower courts, however, disregarded this matter.

Upon defendant, entering the plaintiff's residence defendant went upstairs to plaintiff's room where he found Plaintiff in bed. During the line of questioning defendant asked Plaintiff if anything happened the night before on 29 Oct 2015. Plaintiff responded, "Nothing happened the night before. The defendant continued the same line of questioning about the night before. The Plaintiff stated again, "Nothing happened the night before". Plaintiff informed defendant he stated all he knew and had nothing further to say. Defendant then told Plaintiff, to get out of bed, once Plaintiff was up, defendant told Plaintiff to turn around, defendant then handcuffed the Plaintiff behind his back, defendant then escorted Plaintiff to his patrol car placing him in the back seat, which was full of a liquid, which plaintiff later discovered to be urine. Defendant then returned to the residence where he continued his investigation, this prolonged plaintiff's illegal detention longer than the *Lundstrom* case.

Using the guidelines set by this this court and other courts in *Lundstrom* 616 F,3d 1120 and *Martin* 613 F.3d 1295 case it is at this point defendant is to have probable cause to seize and arrest Plaintiff. Looking into the defendant's actions,

one can conclude defendant lacked any evidence for probable cause to seize and arrest Plaintiff.

This court has held when an arrest occurs, stating;

> "Because an arrest is 'the most intrusive of Fourth Amendment seizures,' an arrest is 'reasonable only if supported by probable cause.'" *Koch v. City of Del City*, 660 F.3d 1228, 1239 (10th Cir. 2011) (quoting *United States v. White*, 584 F.3d 935, 945 (10th Cir. 2009)). The probable cause inquiry is whether at the moment the arrest was made "the facts and circumstances within [the officers] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner **1040* had committed or was committing an offense." *Beck v. State of Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964) (citations omitted)". See *French v. City of Cortez*, 361 F. Supp.3d 1011 HN 48 / Case No. 16-CV-00287-JLK (2019).
>
> While there is no litmus-paper test for determining when an investigative detention enters the realm of an arrest, we have stated an arrest is distinguished from an investigative detention by the involuntary, highly intrusive nature of the encounter. The use of firearms, handcuffs, and other forceful techniques, for example, generally indicate an investigative detention had evolved into an arrest" *Lundstrom*, 616 F.3d at 1120 (internal quotation marks, citation, and alterations omitted). See *French* 361 F.Supp.3d 1011, FN 21.
>
> In *Martin* 613 F.3d 1295, the U.S. Supreme Court Opinion No. 7 they state: "In light of their legal principles governing us, when was Mr. Martin seized? We conclude it wasn't until the officers took hold of him and placed him in *1301 handcuffs..."'

The court held for reasonable suspicion,

> The Court must only consider those facts that occurred prior to the seizure to determine whether it was supported by reasonable suspicion. *U.S. v. Aragones* 2011 WL 13285699 id at 529.
>
> The Court held in *Aragones* Officer Sandy's investigative detention comported with the Fourth Amendment only if he possessed "a reasonable suspicion, grounded in specific and articulable facts, that [Defendant] ... was involved in ... a crime in progress [or] a completed [crime]." *Poolaw v. Marcantel*, 565 F.3d 721, 736 (10th Cir. 2009) (citations omitted). The Court may find that Officer had reasonable suspicion to seize Defendant only if he had "a particularized and objective basis for suspecting [Defendant] of

criminal activity." *United States v. Villagrana-Flores*, 467 F.3d 1269, 1275 (10th Cir. 2006)

An officer may not rely on a "mere hunch" to justify an investigative detention. *Poolaw*, 565 F.3d at 752. However, "the level of suspicion required for reasonable suspicion is considerably less than proof by a preponderance of the evidence." *United States v. Lopez*, 518 F.3d 790, 799 (10th Cir. 2008) (citation omitted).

In conducting the reasonable suspicion calculus, an officer must look to the totality of the circumstances, and he may "draw on [his] own experience and specialized training to make inferences from and deductions about the cumulative information available to [him] that might well elude an untrained person." *Arvizu*, 534 U.S. at 273 (quotation omitted).

The court held for a Seizure,

A Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby) ..., but only when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). See *French v. City of Cortez* 361 F. Supp.3d 1011 FN 20.

In determining the seizure of someone, the Court addressed this in the *Aragones* case, finding "prior to analyzing these asserted factors in the order listed by the Government the Court must determine when precisely Defendant was seized. The Government may not rely on facts occurring after the seizure to justify the seizure at its inception. *United States v. Davis*, 94 F.3d 1465, 1469 n.1 (10th Cir. 1996) ("if the officers' request would have made a reasonable person feel that he or she was not free to leave, then the investigative detention began at exactly that point, and thus Davis' subsequent refusal to comply with the officers' order to stop could not furnish the basis for the [seizure]"); *United States v. Swindle*, 407 F.3d 562, 568 (2d Cir. 2005) ("The settled requirement is, of course, that reasonable suspicion must arise before a search or seizure is actually effected.... [A]n illegal stop cannot be made legal by incriminating behavior that comes after the suspect is stopped."); *see also United States v. Lambert*, 46 F.3d 1064, 1067 (10th Cir. 1995) (framing question as "whether the officers had reasonable, articulable suspicion of criminal activity at the time of the seizure"). A seizure occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v.Chesternut*, 486 U.S. 567, 573 (1988).[3] "also see *U.S. v. Aragones*, 2011 WL 13285699, *Lundstrom*, 616 F.3d 1108.

In the *Aragones* case, the Court states: that Defendant was seized within the meaning of the Fourth Amendment at the moment Officer Sandy ordered him to remove his hand from his pocket, as opposed to the moment

when the officer took control of his arm. *See United States v. Simmons*, 560 F.3d 98, 107 (2d Cir. 2009) (defendant in apartment building common area seized after he complied with officers' second request to "hold on a second," and defendant's subsequent refusal to remove hands from pockets was irrelevant to reasonable suspicion analysis). See *U.S. v. Aragones* 2011 WL 13285699. (Discussions II (A)).

In distinguishing the difference between a Seizure and arrest, the court held.

An investigatory stop is a "seizure" within the meaning of the Amendment. *United States v. Simpson*, 609 F.3d 1140, 1146 (10th Cir. 2010). Such a stop is "reasonable only if 'justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.' " *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). Whereas an arrest requires probable cause of criminal activity, an investigatory stop need only be based on the lesser standard of reasonable suspicion. *Id.* This requires an officer to articulate "a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). The officer must point to specific, articulable facts to support his conclusion that he had reasonable suspicion to conduct the stop, and the Government may further point to "rational inferences drawn from those facts [that] give rise to a reasonable suspicion a person has or is committing a crime." *United States v. DeJear*, 552 F.3d 1196, 1200 (10th Cir. 2009) (quotation omitted).

At the time defendant seized and arrested plaintiff placing him in handcuffs, defendant did not have specific, articulable facts to support his conclusion that he had reasonable suspicion or probable cause to arrest plaintiff; defendant had yet to complete his investigation. Plaintiff was not a flight risk nor danger to anyone; plaintiff was cooperative throughout the entire investigation. The use of handcuffs is greater than a de minimus intrusion *Lundstrom* 616 F.3d 1108 at 3233. In conjunction with not having probable cause to arrest plaintiff, prior to removing the handcuff's defendant twisted them clockwise and raised them above plaintiff's head

injuring plaintiff in the process requiring the officers to take plaintiff to the hospital for the injuries.

By the defendants action he has clearly violated the Plaintiff's IV and XIV constitutional amendment rights to be secure in their persons, houses...against unreasonable searches and seizures... no Warrants shall be issued, but upon probable cause supported by oath... and ...deny to any person within its jurisdiction the equal protection of the laws.

II. The lower courts has departed from accepted and usual course of judicial proceedings and ignored material facts of the case.

In the instant case, just as in '*Aragones*' evidentiary hearing which showed numerous inconsistencies in defendant's testimony and reports filed, this Court found in the '*Aragones*' case the officer's testimony 'not credible'. However, with these exact same set of facts the lower court found the officers testimony 'credible' contradicting this court's opinion on these exact same facts, granting him qualified immunity and probable cause.

In the instant case a Colorado state court and a jury of 12, case No. 15M6879, came to a different conclusion than the lower court regarding officers contradictory reports and testimony, discounting the officers testimony as not credible citing with this court.

The jury found the plaintiff 'Not Guilty' on all charges. In another Colorado court case No. 16cv25 the respondent paid the Plaintiff damages for the false charges made against Plaintiff. The two Federal court did acknowledge plaintiff

acquittal of all charges; however, the lower courts disregarded the facts of the case and came to the opposite conclusion of *Aragones* and the two Colorado state Courts using defendant's testimony to justify the lower courts Order and Judgment.

The lower court also mischaracterizes the sequence of events, in the lower courts Order and Judgment Pg.5, para 2, the lower court states: "Finally, Granillo spoke with Rivera... "Giving the impression the Defendant spoke with the Plaintiff last when defendant actually spoke with plaintiff at the beginning, upon defendant entering the plaintiff's residence.

In the *Aragones* case when the court looked into Officer Sandy's version of facts from Officers testimony and reports too witnesses the court found the officers version was not credible and he left important facts out which were relevant to that case. This is exactly what happened in the Plaintiff's case the defendant's reports contradict his deposition testimony and the defendant left out crucial information to obtain the affidavit for arrest.

III. The lower courts do not address Plaintiff's issues, Use of Excessive Force when defendant twisted and raised Plaintiff's handcuffs above his head and Plaintiff's Bill of Cost.

In the lower courts Order and Judgment, case No. 17-cv-01667-KMT (App. A) Pg. 9, FN 3, the lower court acknowledges the lower District Court's Summary Judgment does not address defendant twisting and raising the plaintiff's handcuff's above plaintiff's head prior to removing them injuring plaintiff in the process require him to seek medical treatment. Plaintiff addressed this in his Opening

Brief, and throughout this entire case. The lower court also leaves out defendant twisting the handcuffs clockwise.

In the Court's Order and Judgment Pg. 12, para 3 – Pg. 13 the court states: "Mr. Rivera's attorney's fee argument is not a misnamed attack on costs...Because the district court made no fee award, this argument is moot." (See App. A)

On Mar 13, 2020 at 2:21 & 4:40 PM MDT, the lower District Court entered an Order and Final Judgment Order case No. 17-cv-01667-KMT, granting defendants Motion for Summary Judgment. In the Order Pg. 9 para. 5, and the Final Judgment Order Pg. 1, para 3, states: defendant is awarded his costs. (See App. C & D).

On July 24, 2020, the lower court denied plaintiff's Motion to 'Stay' lower District court's Bill of Cost hearing. (See App. G). Had the lower court granted it, this would have allowed plaintiff the opportunity to concentrate solely on his Reply Brief. In the District Court's Bill of Cost hearing the Court Ordered Plaintiff to pay $3568.95. In conjunction with the Motion to 'Stay the plaintiff has raised this issue in his Petition for Rehearing (En Banc), Pg. 14 Para 2, the plaintiff clearly states 'Bill of Cost' in the caption. Plaintiff also states in that caption "... the District Courts Order requiring him to pay Defense Fees." The lower court never address Plaintiff's Bill of Cost issue.

The plaintiff filed Petition for Rehearing (En Banc) on 18 Mar 2021. In that Petition, Pg. 14, para 2, plaintiff addressed the Bill of Cost with the lower court stating ..."Plaintiff is ordered to pay $3568.95 and asked this Court to address this

issue." The lower court was aware the lower District Court made this decision. On Apr 5, 2021, the lower court issued an Order Denying Petition for Rehearing (En Banc) never addressing the plaintiff's Petition.

XII. Conclusion

For the foregoing reasons, the plaintiff prays the court grant plaintiff's Petition for Writ of Certiorari and reverse the 10th Circuit Court of Appeals Order.

Respectfully submitted this 28th day of July 2021

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