No. 16-3014

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADLYNN K. HARTE, *et al.*,
Plaintiffs-Appellants

v.

THE BOARD OF COMMISSIONERS OF
THE COUNTY OF JOHNSON, KANSAS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court, District of Kansas
The Honorable John W. Lungstrum, U.S. District Judge
No. 2:13-cv-02586

SGT. JAMES WINGO'S APPELLEE BRIEF

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ORAL ARGUMENT REQUESTED

Table of Contents

Table of Authorities

Cases

Rules

Prior or Related Appeals

There are no prior or related cases or appeals.

Statement of the Issues

According to Appellants, the issues presented are:

1. Whether substantial record evidence that the deputies intentionally or recklessly submitted a perjured search-warrant affidavit requires them to stand trial;
2. Whether substantial record evidence that the deputies' search of the home and detention of the family exceed the scope of the warrant requires them to stand trial; and
3. Whether substantial record evidence that the deputies conducted an intimidating tactical raid, pointed a gun at Bob Harte, and detained the family under armed guard requires them to stand trial.

None of those issues relates to the conduct of Sgt. Wingo. Thus, the issue presented with respect to Sgt. Wingo is whether he can be held liable for the actions of the Johnson County Defendants that allegedly violated the Hartes' constitutional rights.

Mullenix v. Luna, 106 S. Ct. 305 (2015)

Lewis v. Tripp, 604 F.3d 1221 (10th Cir. 2010)

Poolaw v. Marcantel, 565 F.3d 721 (10th Cir. 2009)

Statement of the Case

The predicate facts, as they relate to the Hartes' lawsuit against Sergeant James Wingo, are not in dispute.

In 1997, the Missouri State Highway Patrol began monitoring hydroponic stores. (App. to Appellant's Br., A667.)[1] Starting in 2007, Sgt. Wingo created spreadsheets that identified individuals who were seen shopping at two local hydroponic stores. (App., A603-A604 .) By early 2011, investigations that started from surveillance conducted at hydroponic stores had resulted in the dismantling of approximately 130 indoor marijuana growing operations. (App., A685.)

On April 4, 2011, Sgt. Wingo met with officers and representatives from various law enforcement agencies in the Kansas City metro area and disseminated the spreadsheets he compiled from 2007 to 2011. (App., A612, A667.) Because the information Sgt. Wingo provided was for individuals who had not yet been investigated, each agency was required to follow up and conduct its own investigation. (App., A612.) The 2011 Missouri State Highway Patrol Operation Constant Gardener

[1] Citations to the Appendix to Appellant's Brief will be abbreviated App. Citations to the Appendix filed by Appellee Sgt. Wingo will be abbreviated Mo. Appx.

resulted in the discovery of 32 home-grow operations and the seizure of 1,583 marijuana plants and 256 ounces of processed marijuana. (Mo. Appx., MA046.)

On June 9, 2011, Sgt. Wingo gave training to the Johnson County Sheriff's Office focusing on how marijuana is grown hydroponically. (App., A621-A622; Mo. Appx., MA052.) On August 9, 2011, Sgt. Wingo observed Mr. Harte shopping at a hydroponic store. (App., A618.) Later that month, Deputy Reddin and Sgt. Wingo exchanged emails regarding Johnson County residents shopping at hydroponic stores, with Sgt. Wingo stating that he would get Deputy Reddin "the info." (App., A619.)

In January 2012, Deputy Reddin indicated to Sgt. Wingo that the Johnson County Sheriff's Office was interested in participating in another Operation Constant Gardener. (App., A690; Mo. Appx., MA028-MA029.) On February 29, 2012, Sgt. Wingo responded that he would start putting together a new excel spreadsheet. (App., A690.) On March 20, 2012, Sgt. Wingo emailed Deputy Reddin a spreadsheet that contained information regarding Johnson County residents who had shopped at hydroponic stores. (App., A690.) At least one of the "tips" on the spreadsheet led to a conviction. (Mo. Appx., MA098-MA112 .) The

spreadsheet contained the Hartes' information, which was truthful and accurate. (App., A65-A66, A695; Mo. Appx., MA009; Mo. Appx., MA013.)

Sgt. Wingo did not participate in or supervise (1) the inspection of the contents of the Hartes' trash; (2) the field testing of the plant material found there; or (3) the drafting of the search warrant application. (App., A705-710; Mo. Appx., MA041.) Sgt. Wingo did not participate in the execution of the search warrant at the Hartes' home. (Mo. Appx., MA042.)

Summary of the Argument

The district court properly granted summary judgment to Sgt. Wingo, because he had qualified immunity from the Hartes' lawsuit. There was no affirmative link between Sgt. Wingo and the Fourth Amendment violations alleged by the Hartes.

To show an "affirmative link," the Hartes needed to establish: (1) personal involvement; a sufficient causal connection; and (3) a culpable state of mind. Failing to establish any one of these was fatal to the Hartes' claim. They failed to establish all three. And even if the Hartes had succeeded in affirmatively linking Sgt. Wingo to the constitutional violation, they still had to show that existing law rendered it "beyond debate" that what Sgt. Wingo was doing violated the Fourth Amendment. They did not even attempt to meet this burden. Had they tried, no case law exists establishing that Sgt. Wingo's conduct violated the Fourth Amendment.

Because the Hartes failed to establish that Sgt. Wingo violated a clearly established constitutional right, they failed to overcome Sgt. Wingo's qualified immunity. As such, their claim against Sgt. Wingo failed as a matter of law.

Standard of Review

This Court reviews the "grant of summary judgment *de novo*, applying the same legal standards as employed by the district court." *Gomes v. Wood*, 451 F.3d 1122, 1127 (10th Cir. 2006). A party is entitled to summary judgment when the party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

In qualified immunity cases, once the predicate facts have been established, the question always becomes one of law. *Gomes,* 451 F.3d at 1136. Once the defendant demonstrates the facts necessary to establish judgment as a matter of law, the burden then shifts to the plaintiff to establish the necessary elements to his recovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-324 (1986). To defeat a motion for summary judgment based on qualified immunity, "a plaintiff must demonstrate on the facts alleged: (1) that the government official violated her constitutional or statutory rights, and (2) that the constitutional right was clearly established at the time of the alleged unlawful activity." *McInerney v. King*, 791 F.3d 1224, 1231 (10th Cir. 2015).

Argument

Sgt. Wingo, a Missouri State Highway Patrol officer, was entitled to summary judgment on the Hartes' claims under 42 U.S.C. § 1983, which alleged violations of the Fourth and Fourteenth Amendments, because he has qualified immunity. The Hartes' action stemmed from the search of their home conducted with a warrant by the Johnson County Sheriff's Office. Sgt. Wingo did not participate in or supervise applying for the search warrant or conducting the search. Instead, he merely truthfully and accurately informed the Johnson County Sheriff's Office that Bob Harte had previously shopped at a hydroponics store. He also provided a four-hour training focused on hydroponically growing marijuana.

Qualified immunity is "'the norm' for public officials[.]" *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010). It insulates from suit "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). To overcome Sgt. Wingo's qualified immunity, the Hartes must show that Sgt. Wingo's own individual actions violated their constitutional rights. *Schneider v. City*

of Grand Junction Police Dept., 717 F.3d 760, 768 (10th Cir. 2013). They did not—and cannot—do so. This Court should affirm the district court.

I. There is no affirmative link between Sgt. Wingo and the constitutional violations that the Hartes allege.

The Hartes' claim against Sgt. Wingo depends on the notion that he—not the Johnson County Defendants—violated their constitutional rights. But their pleadings and their issues presented in the brief filed in this Court belie such an assertion. The Hartes do not claim that Sgt. Wingo's actions directly violated their constitutional rights; the alleged violation occurred during the search and seizure, after the Johnson County Defendants conducted a follow-up investigation and received a search warrant. And it is those actions for which the Hartes seek to hold Sgt. Wingo liable.

The theory of liability on which the Hartes rely has often been referred to as "supervisory liability," which "can be misunderstood as implying vicarious liability." *Id.* at 767. "'Section 1983 does not authorize liability under a theory of respondeat superior.'" *Id.* (*quoting Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011)). Without vicarious liability, Sgt. Wingo is not liable for the Johnson County

Defendant's actions, only his own. *Id.; see Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

The Hartes cannot show an "affirmative link" between Sgt. Wingo and the alleged constitutional violation here – the search of their home based on an allegedly perjured search-warrant affidavit; the scope of the search; and the force used to execute the search and seizure. To show an affirmative link, a plaintiff must establish: A.) personal involvement; B.) a sufficient causal connection; and C.) a culpable state of mind. *Id.* The Hartes did not—and, indeed, cannot—do so.

A. The Hartes did not establish Sgt. Wingo's personal involvement in the alleged constitutional violations.

Sgt. Wingo did not intentionally or recklessly submit a perjured search-warrant affidavit. He did not participate in or supervise the search of the Hartes' home or the detention of the Hartes during that search. And he did not participate in or supervise the alleged intimidating tactical raid, did not point a gun at Bob Harte, and did not participate in or supervise the detention of the family under armed guard during the search.

Instead, Sgt. Wingo surveilled hydroponics stores. He created spreadsheets of the customers that he observed leaving hydroponics stores. And he passed that information along to the Johnson County Sheriff's Office a month before the search in this case. Also, in 2011, Sgt. Wingo provided a four-hour training to the Johnson County Sheriff's Office focused on hydroponically growing marijuana.

"In *Iqbal*, the Supreme Court explained that '[b]ecause vicarious liability is inapplicable to … § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Schneider*, 717 F.3d at 768 (*quoting Iqbal*, 556 U.S. at 676). In order to establish so-called "supervisory" liability, the Hartes would have to show, at a minimum, that Sgt. Wingo was the Johnson County Defendants' "supervisor." *Bruner-McMahon v. Hinshaw*, 846 F. Supp. 2d 1177, 1215 (D. Kan. 2012) (granting summary judgment on § 1983 "supervisory" claim because "Plaintiffs [had] not presented evidence that [defendants] had any duty or responsibility to train or supervise [alleged wrongdoers]."). To be a supervisor under § 1983, the person must be delegated policy-making authority over the alleged wrongdoer. *Id.* ("[T]o establish

supervisory liability, plaintiffs must establish that … defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy.").

Neither the truthful and accurate information provided by Sgt. Wingo, nor the training, establishes that Sgt. Wingo was a supervisor of the Johnson County Defendants. The Hartes have not shown that Sgt. Wingo, a Missouri State Highway Patrol officer, had policy-making authority over the Johnson County Defendants.

It seems a stretch to claim that passing along truthful and accurate information—*i.e.,* that Bob Harte shopped at a hydroponics store in August 2011—or providing a four-hour training in June 2011 focused on hydroponically growing marijuana meets the standards for personal involvement in a search occurring in April 2012. But even if this meets the "stricter liability standard for this first element of personal involvement[,] as set forth in *Iqbal*," the Hartes' claim against Sgt. Wingo falls apart at the second element.

B. The Hartes did not establish a sufficient causal connection between Sgt. Wingo's actions and the alleged constitutional violations.

To show a sufficient causal connection, a plaintiff must show that "the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights." *Poolaw v. Marcantel*, 565 F.3d 721, 732-33 (10th Cir. 2009) (*quoting Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990)). "To prevail on a claim brought pursuant to § 1983, a plaintiff must demonstrate the defendant was both the but-for and proximate cause of the plaintiff's injury." *Calvert v. Ediger*, 415 Fed. Appx. 80, 83 (10th Cir. 2011). In other words, the Hartes had the burden to show not only that the constitutional violation would not have occurred absent Sgt. Wingo's truthful and accurate information, but that Sgt. Wingo "should have known" that his conduct would lead the Johnson County Defendants to conduct an "unlawful investigation" of the Hartes. *Lewis*, 604 F.3d at 1230. The Hartes did not do so.

1) The Hartes have not and cannot show that Sgt. Wingo should have known that his "tip" would lead to an unlawful investigation.

Sgt. Wingo's "tips" had led to dozens of lawful investigations. (Mo. Appx., MA046 .) Indeed, the very spreadsheet that Sgt. Wingo sent the

Johnson County Defendants resulted in at least one lawful conviction. (Mo. Appx., SA098-MA112 .) And, in general, Missouri law enforcement agencies have obtained scores of convictions from such efforts. (App., A685.) Specifically here, the previous year, Sgt. Wingo acknowledged that the Johnson County Sheriff's Office would be unable to make use of his tip because of local requirements. (App., A671.)

It bears repeating that Sgt. Wingo provided truthful and accurate information that required a follow-up investigation to determine if there was criminal activity afoot.[2] In fact, the Johnson County Sheriff's Office conducted a follow-up investigation. And it was the results of that investigation that led to a search warrant of the Hartes' home. So it is unsurprising that the Hartes do not argue anything more than "but-for" causation. But they necessarily must also argue that Sgt. Wingo should have known that, upon receiving the "tip," the Johnson County Defendants would conduct an unlawful investigation. Even still, argument is not enough. It is the plaintiff's burden "to come forward with *some evidence* that [the defendant] knew or should have known

[2] This case is a far cry from *Snell*, for instance, where the defendants fabricated allegations and "knew that such allegations were untrue." 920 F.2d at 698.

that an unlawful investigation would follow from" the defendant's actions. *Lewis*, 604 F.3d at 1230 (emphasis added). The Hartes failed to do so here.

2) The Hartes have not and cannot show that Sgt. Wingo should have known that his training focused on hydroponically growing marijuana would lead to an unlawful investigation.

In June 2011, Sgt. Wingo provided the training to the Johnson County Sheriff's Office. The Hartes point to no deficiency in the training that Sgt. Wingo provided to the Johnson County Defendants. Their failure to do so is fatal to their claim that the training caused the constitutional violations alleged in their lawsuit. "Plaintiffs must identify a specific deficiency in the training program that was … obvious and closely related to their injury." *Id.* at 1210.

Instead, the Hartes complain of Sgt. Wingo's methods generally—surveilling hydroponic stores and following up on the surveillance with a short investigation. Because they failed to point to a specific defect in the training, the Hartes failed to establish a causal connection between the four-hour training and the alleged Fourth Amendment violation. Because they did not establish that connection, the Hartes cannot rely

on the four-hour training to sustain their claim for "supervisory" liability.

3) Sgt. Wingo did not deceive or unduly influence the court that issued the search warrant.

"Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner, or as we have sometimes put it, in objective good faith." *Rathbun v. Montoya*, 628 Fed. Appx. 988, 993-94 (10th Cir. 2015). As such, the fact that a warrant issued cuts off any causal connection to a plaintiff's injury unless the plaintiff can show that the officer (1) engaged in deception; or (2) otherwise unduly influenced the prosecuting attorney or the Court in issuing the warrant. *Calvert*, 415 Fed. Appx. at 84.

Here, the Hartes showed neither deception nor undue influence by Sgt. Wingo on the warrant's issuance. Sgt. Wingo provided the Johnson County Defendants truthful information, and he did not participate in the warrant application. Thus, the Hartes did not prove causation as a matter of law. It was not foreseeable that officers would take truthful

information and use it to convince a judge to issue a warrant that allegedly violated the Fourth Amendment. *Id.*

C. The Hartes did not establish that Sgt. Wingo had the requisite culpable state of mind.

Neither the tip, nor the training that Sgt. Wingo provided to the Johnson County Defendants establishes liability under § 1983. Even assuming that Sgt. Wingo was a supervisor of the Johnson County Defendants, which he was not, the Hartes failed to show that St. Wingo was deliberately indifferent to their rights. They must do so to impose "supervisory" liability against him. *Schneider*, 717 F.3d at 771; *Dodds v. Richardson*, 614 F.3d 1185, 1196 (10th Cir. 2010). "Deliberate indifference can be satisfied by evidence showing that the defendant 'knowingly created a substantial risk of constitutional injury.'" *Schneider*, 717 F.3d at 769(*quoting Dodds*, 614 F.3d at 1206).

Sgt. Wingo did not participate in any of the conduct that allegedly harmed the Hartes—*i.e.,* he did not participate in the warrant application or in the search of their residence. (Mo. Appx., MA041-MA042.) Instead, the Hartes point to Sgt. Wingo's participation in dozens of lawful searches. That Sgt. Wingo had participated in dozens of lawful searches in exactly the same circumstances as here militates

against a finding that Sgt. Wingo knowingly created a substantial risk of constitutional injury.

Indeed, the Hartes' argument to the contrary would turn qualified immunity on its head and seemingly hold any law enforcement officer liable for providing another agency truthful and accurate information. According to the Hartes, all law enforcement officers apparently should know that an unlawful investigation could result. That is not the law. Rather, qualified immunity is "'the norm' for public officials[.]" *Lewis*, 604 F.3d at 1225. The Hartes failed to overcome Sgt. Wingo's qualified immunity by showing an "affirmative link" between Sgt. Wingo and the alleged constitutional violations.

II. The Hartes did not show that existing law rendered it "beyond debate" that what Sgt. Wingo was doing violated the Fourth Amendment

Even assuming that the Hartes met their burden to show that Sgt. Wingo violated their Fourth and Fourteenth Amendment rights, which they did not, that showing is not enough to overcome Sgt. Wingo's qualified immunity. "A plaintiff may overcome a public official's qualified immunity only by showing, first, that the official violated the plaintiff's federal statutory or constitutional rights, and, second, that

the rights in question were clearly established at the time of their alleged violation." *Id.*

The "clearly established" law prong of the qualified immunity analysis requires the Court to decide whether existing law rendered it "beyond debate" that the particular conduct at issue violated the Constitution. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). The Supreme Court has "repeatedly told courts … not to define clearly established law at a high level of generality. The dispositive question is whether the violative nature of *particular conduct* is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* (citations and quotation marks omitted) (emphasis added).

The Hartes failed to show any law—let alone clearly established law—that would stand for the proposition that surveilling hydroponic stores, and following up on the surveillance with a short investigation in the weeks prior to the search, violates the Fourth Amendment. It was the Hartes' "burden to convince the court that the law is clearly established." *Lutz v. Weld Cty. Sch. Dist. No. 6*, 784 F.2d 340, 342-43 (10th Cir. 1986). To meet that burden, "the plaintiff must point to a

Supreme Court or Tenth Circuit decision on point, or [to a] clearly established weight of authority from other courts." *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015).

"The law is also clearly established if the conduct is so obviously improper that any reasonable officer would know it was illegal." *Id.* The Hartes did not even attempt to meet that burden with respect to Sgt. Wingo's conduct. They discussed general Fourth Amendment principles with regard to the Johnson County Defendants' conduct, but failed to cite a single case that would establish that Sgt. Wingo's conduct violated the law. Because they failed to cite to an on-point case from the Supreme Court or the Tenth Circuit, or a consensus from other courts, to show that clearly established law rendered it "beyond debate" that what Sgt. Wingo was doing violated the Fourth and Fourteenth Amendment, the Hartes failed to meet their burden for the purposes of overcoming Sgt. Wingo's qualified immunity.[3]

[3] None of the issues raised by amici relate to Sgt. Wingo's conduct in this case, so those issues are not addressed in this brief.

Conclusion

For the reasons set forth above, this Court should affirm the district court's order granting Sgt. Wingo's motion for summary judgment.

Statement Regarding Oral Argument

Sgt. Wingo requests oral argument to assist the panel in answering important questions within the context of this case concerning the issues of qualified immunity and "supervisory" liability in a time where the interagency flow of truthful and accurate information is more important than ever.

Respectfully submitted,

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Certificate of Compliance and Certificate of Service

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/s/ *Jeremiah J. Morgan*
Deputy Solicitor General