IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICAH JESSOP; BRITTAN ASHJIAN,

Plaintiffs - Appellants,

v.

CITY OF FRESNO; DERIK KUMAGAI; CURT CHASTAIN; TOMAS CANTU,

Defendants-Appellees.

No. 17-16756

D.C. No. 1:13-cv-00316-DAD-SAB
Eastern District of California, Fresno

APPELLANTS' OPENING BRIEF

Kevin G. Little, Esq.
Law Office of Kevin G. Little
P.O. Box 8656
Fresno, California 93747
Tel. (559) 342-5800
Fax (559) 420-0839
E-Mail: kevin@kevinglittle.com

Attorney for Appellants Micah Jessop and Brittan Ashjian

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

MISCELLANEOUS

INTRODUCTION

The district court exonerated – without a trial – a convicted felon ex-officer and his cohorts, although the record suggests they stole in excess of $200,000 in cash and collectible currency. While the search warrant permitted cash seizures (Excerpt of Record ["ER"] 276), neither the warrant nor the law authorized the officers to seize money without inventorying, reporting, or booking it. Instead, the search warrant required anything seized to be retained and held as evidence at the Fresno Police Department. ER 273, 276, 286.

The district court declined to address whether the theft of property during a search is unconstitutional, ER 15, although that is hardly a thorny issue subject to reasonable debate. It is self-evident that stealing under the guise of a search warrant is blatantly unlawful. The founders of our democracy recognized this centuries ago, and pronounced that the lawless but ostensibly legal taking of one's property "is inconsistent with every idea of liberty." The Father of Candor, *A Letter Concerning Libels, Warrants, Seizure of Papers, and Security for the Peace*, pp. 54-55 (3rd Ed. 1765). As will be demonstrated herein, this premise has endured through the development of our constitutional jurisprudence.

The district court found this question was so unsettled that the officers deserved qualified immunity. ER 14. That was an erroneous determination, since "the relevant,

dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [defendant] that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 194-195 (2001) (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). Qualified immunity is not intended to protect "those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Because no reasonable officer would think that stealing personal property while executing a search warrant was lawful, the district court's grant of qualified immunity was erroneous and requires reversal.

STATEMENT OF JURISDICTION

Based on the complaint filed on February 26, 2015, the district court had subject matter jurisdiction over this civil action pursuant to 28 U.S.C. §§ 1331 and 1343. Docket Number ("Dkt. No.") 1; ER 522. This Court has appellate jurisdiction over the district court's summary judgment ruling and corresponding judgment filed on August 1, 2017, pursuant to 28 U.S.C. § 1291. Dkt. Nos. 65, 66; ER 1, 27. This Court also has jurisdiction to review the merits of this appeal, as the notice of appeal was timely filed in accordance with Federal Rule of Appellate Procedure 4(a) on August 15, 2017. Dkt. No. 69; ER 25.

STATEMENT OF ISSUES PRESENTED

This appeal presents the following singular issue:

Whether the district court erred in granting summary judgment on the basis of qualified immunity, although a reasonable officer would know that stealing money seized during the execution of a search warrant violates the United States Constitution.

STATEMENT OF THE CASE

Appellants Micah Jessop ("Jessop") and Brittan Ashjian ("Ashjian") filed their complaint on September 16, 2014, alleging unreasonable search and seizure, violation of procedural due process, violation of substantive due process, and municipal liability. Dkt. No. 1; ER 522. The named defendants, including appellees Derik Kumagai ("Kumagai"), Tomas Cantu ("Cantu"), Curt Chastain ("Chastain"), and the City of Fresno, answered the complaint. ER 495, 506.[1]

Appellees filed summary judgment motions that were fully briefed by all parties. Dkt. Nos. 51-60.

On August 1, 2017, the district court granted the motion for summary judgment and dismissed the entire action. Dkt. Nos. 65, 66; ER 1, 27.

Jessop and Ashjian filed a timely notice of appeal. Dkt. No. 69; ER 25.

---

[1]The other individual defendants were dismissed via stipulation. Dkt. No. 50; ER 493.

This appeal ensues.

STATEMENT OF FACTS

Both at trial and on appeal, the summary judgment record must be construed most favorably to the non-movant. Accordingly, the following facts have to be accepted for purposes of this appeal:

The operative facts are relatively simple, and even the district court recognized they were in dispute. ER 3. In connection with the execution of a search warrant on September 10, 2013, $50,942 was inventoried and logged as evidence at the Fresno Police Department. ER 306-308. However, Jessop and Ashjian calculated based on their business records that $131,380 had been seized, and collectible coins and currency worth $125,000 had also been taken. ER 177, 217, 233, 241.

At the time of the execution of the search warrant, Jessop and Ashjian had an ATM business that operated at hundreds of locations in the Central Valley, and they personally loaded their machines with large amounts, hundreds of thousands of dollars, of cash. ER 140-151.

The subject warrant was not issued based on Jessop's and Ashjian's ATM business but instead on a four month investigation into their ownership of a dozen "coin pusher" machines that operated at local convenience stores. ER 54, 58-61. The

illegality of coin pusher machines had been subject to question until the Bureau of Gambling Control decided in November 2010 that they were games of chance rather than skill. ER 30, 83. Even after 2010, the ownership and operation of a coin pusher was a misdemeanor. ER 86.

The coin pusher investigation was led by Kumagai, who by the time of the filing of this action was a convicted felon, having plead guilty in a federal conspiracy prosecution that resulted in his receiving a two-year sentence. ER 37. Chastain and Cantu, both still members of the Fresno Police Department, also assisted in supervising the investigation. ER 82, 98.

Money and coins identified for seizure were left for Kumagai to seize personally, and he, Cantu and Chastain were the last officers on scene. ER 68, 110-111, 209. Kumagai went alone into the bedroom at the Jessop residence where the collectible coins and currency were, and no one has seen them since. ER 43-45. Photographs that had been taken of some of the seized money have disappeared without explanation. ER 65, 86-87, 103.

SUMMARY OF ARGUMENT

Many authorities establish that deliberate theft during the execution of a search warrant, like other intentional deprivations of property by state actors, is blatantly

unconstitutional. The district court failed to answer this question and instead found that the issue was sufficiently doubtful that Kumagai, Cantu, Chastain, and the City of Fresno were entitled to summary judgment.

Notwithstanding the district court's decision, a reasonable officer would very clearly understand that theft under the guise of a search warrant is unlawful, and that qualified immunity is not available to those who commit such an egregious transgression.

Reversal is thus warranted, and this matter should be remanded for trial.

STANDARD OF REVIEW

I. Summary Judgment

As this Court stated in *Bravo v. City of Santa Maria*, 665 F.3d 1076 (9th Cir. 2011):

> We review the district court's grant of summary judgment de novo. *Delia v. City of Rialto*, 621 F.3d 1069, 1074 (9th Cir. 2010). Viewing the evidence and drawing all inferences in the light most favorable to the non-moving party, we must determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. *Id.*; *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986). If a rational trier of fact could resolve a genuine issue of material fact in the nonmoving party's favor, the court "may not affirm a grant of summary judgment . . . because credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a

> judge." *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir. 2009) (internal quotation marks and alterations omitted).

Bravo, 665 F.3d at 1083.

ARGUMENT

I. Theft During the Execution of a Search Warrant is Blatantly Unconstitutional, and the District Court Erred in Extending Qualified Immunity to the Responsible Officers

The district court erroneously found that Kumagai, Cantu and Chastain were entitled to qualified immunity, ER 15-16, even though the record suggests that they only turned in $50,000 of the more than $250,000 they seized. Contrary to the terms of the warrant, ER 273, 276, 286, four-fifths of the cash seized was not inventoried, reported, or booked to be retained and held as evidence at the Fresno Police Department. ER 273, 276, 286. The district court found that the officers complied wit the subject warrant, ER 8, but failed to recognize that the warrant not only authorized the seizure of money but dictated what was supposed to be done with it upon seizure.

A search warrant does not give officers license to commit theft of personal property unrelated to the search and not documented as being seized as part of the search. The official seizure of personal property pursuant to a warrant, but with no indication of an intent to use it for any legitimate purpose, is "patently unconstitutional." *United States v. Webster*, 809 F.3d 1158, 1170 (10th Cir. 2016). The district court

cited numerous decisions holding that theft during the execution of a search warrant is unconstitutional, ER 12, but still found the issue to be in question based on clearly distinguishable cases that dealt with situations other than the intentional theft or destruction of property and were inapposite. ER 12-13.

In finding that the law was sufficiently unsettled as to warrant qualified immunity, the district court placed undue reliance (ER 13-14) on an outlier decision that contained no analysis of the issue, *Slider v. City of Oakland*, 2010 WL 2867807 (N.D. Cal. Jul. 19, 2010). Slider held that "theft following the initial search and seizure should not be viewed as a constitutional violation, but rather as a tortious injury redressable under the state law of conversion." *Id*. at *4.

The flaw of *Slider* was cogently discussed in *Collins v. Guerin*, Case No. 14-cv-00545-BAS (BLM) (S.D. Cal. Dec. 17, 2014), which concluded that a theft occurring during the search and seizure is more akin to cases involving destructive behavior during a search:

> "An officer's conduct in executing a search is subject to the Fourth Amendment's mandate of reasonableness from the moment of the officer's entry until the moment of departure." *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 971 (9th Cir. 2005) (quoting *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997)); *see also United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) ("In determining whether or not a search is confined to its lawful scope, it is proper to consider both the purpose disclosed in the application for a warrant's issuance and the manner of its execution." (emphasis added)).

> Thus, behavior or actions "beyond that necessary to execute [the] warrant[s] effectively, violates the Fourth Amendment." *San Jose*, 402 F.3d at 971 (quoting *Liston v. Cnty. of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997)).

Collins, slip op. at p. 7-8. "Destruction of property that is not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment." *Tarpley v. Greene*, 684 F.2d 1 (D.C.Cir.1982); *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000); *United States. v. Ramirez*, 523 U.S. 65, 71 (1998) ("[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful.").

This Circuit and the Supreme Court have also held that "a seizure becomes unlawful when it is more intrusive than is necessary." *Ganwich v. Knapp*, 319 F.3d 1115, 1119 (9th Cir. 2003) (quoting *Florida v. Royer*, 460 U.S. 491, 504 (1983)); *see also Wilson v. Lane*, 526 U.S. 603, 611 (1999) (citing *Ariz. v. Hicks*, 480 U.S. 321, 325 (1987)). The district court ignored this principle by assuming, without any supporting evidence, that the missing cash was seized in compliance with the warrant and then only subsequently was stolen. ER 15. However, the record supports a more likely inference that the initial seizure of the great majority of the money failed to comply with the warrant and that there was never any intention to inventory, report, book and retain it as required under the terms of the warrant.

The district court also erred in refusing to analyze the issue presented as a matter of substantive due process, simply because it found that the Fourth Amendment governed (but in its estimation not clearly so). ER 16-17. Officer misconduct may implicate multiple constitutional provisions. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) ("We have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another.").

The district court found this question was so unsettled that the officers deserved qualified immunity. ER 14. That was an erroneous determination, since "the relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [defendant] that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 194-195 (2001) (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). Qualified immunity is not intended to protect "those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Because no reasonable officer would think that stealing personal property while executing a search warrant was lawful, the district court's grant of qualified immunity was erroneous and requires reversal.

CONCLUSION

Based on the foregoing, the record in the light most favoring Jessop and Ashjian, reversal is thus warranted. This matter should be remanded for trial.

Respectfully submitted,

Dated: January 8, 2018

KEVIN G. LITTLE
LAW OFFICE OF KEVIN G. LITTLE
Post Office Box 8656
Fresno, California 93747
Telephone: (559) 342-5800
Facsimile: (559) 420-0839
E-Mail: kevin@kevinglittle.com

By /s/ Kevin G. Little
Kevin G. Little

Attorneys for the Appellants Micah Jessop and Brittan Ashjian

BRIEF FORMAT CERTIFICATION

Pursuant to Circuit Rule 32(a)(7), I certify that the opening brief is proportionately spaced, has a typeface of 14 points or more and contains 2,449 words.

Date: January 8, 2018

/s/ Kevin G. Little
Kevin G. Little

STATEMENT OF RELATED CASES

There are no cases related to the present case now before this Court.

Date: January 8, 2018

/s/ Kevin G. Little
Kevin G. Little

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that this document has been served in accordance with the Federal Rules of Appellate Procedure and Local Rules of this Court to: Daniel P. Barer, Esq., Pollak, Vida & Barer, 11150 West Olympic Blvd., Suite 900, Los Angeles, California 90064.

Date: January 8, 2018

/s/ Kevin G. Little
Kevin G. Little

CERTIFICATION OF SAMENESS

I HEREBY CERTIFY that the foregoing brief is identical to that which was filed electronically on January 8, 2018

Date: January 8, 2018

/s/ Kevin G. Little
Kevin G. Little