

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CARSON DARNELL COMBS,
Plaintiff,

v.

MEMORANDUM and ORDER
06-C-156-S

RICHARD J. SWENSON, FREDERICK
VON RUDEN, RICHARD YUNK, FRITZ
A. DEGNER and CHARLES AMUNDSON,

Defendants.

Plaintiff Carson Darnell Combs was allowed to proceed on his Fourth Amendment Claims against defendants Richard J. Swenson, Frederick Von Ruden, Richard Yunk and Fritz A. Degner. He was also allowed to proceed on his malicious prosecution claim against defendant Charles Amundson and on his conspiracy claim against all the defendants. In his complaint plaintiff alleges that defendants Swenson, Von Ruden, Yunk and Degner entered his home without his consent and searched his home without his consent. He further alleges that defendant Amundson maliciously prosecuted him for misdemeanor battery and that the defendants conspired to deprive him of his civil rights.

On May 26, 2006 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. Plaintiff's opposition brief to defendants'

motion was to be filed not later than June 15, 2005 and has not been filed to date.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to the following material facts.

Plaintiff Cason Combs is an adult resident of Monroe County, Wisconsin. Defendants Richard J. Swenson, Frederick Von Ruden, Richard Yunk and Fritz A. Degner are Monroe County Sheriff's deputies. Defendant Charles Amundson is the Sheriff of Monroe County.

On the evening of July 17, 2003 at approximately 11:10 Deputy Swenson received a call from dispatch that a domestic dispute was occurring at the Comb's residence in Tomah, Wisconsin. The dispatcher advised Swenson that Ruth Wilson, the sister of Karen Combs, had called 911 reporting that Carson Combs was beating up her sister. Based upon his training and experience Swenson was aware that domestic disputes frequently result in serious incidences of violence, likely involve weapons and are typically volatile situations. All available deputies were dispatched to the Combs residence. Law enforcement officers had been to the Combs residence previously on domestic abuse related calls.

Swenson and Deputies Yunk and Von Ruden arrived at the Combs residence at about 11:25 p.m and the residence was dark. Swenson knocked loudly on the side door for approximately three to four minutes. Carson Combs then came to the front door and opened it. Swenson asked Combs whether he knew why the officers had come to his house. He responded that he did not know and that his wife was sleeping. He then called back into the house, "your fucking sister

must have called the cops." Swenson informed Combs of the 911 call and the necessity of contacting Combs and his wife.

Swenson was concerned for the safety of Karen Combs and wanted to talk to her. Combs turned on the light in the living room area and said "Yes, come in. Nothing happened." Combs opened the front door wider and the three officers entered the home. Swenson looked around the immediate area and asked Combs where was his wife. Combs said she was sleeping and pointed down the hallway. Swenson went to check on her and found her seated on the bed. Karen Combs told Swenson that plaintiff had struck her in the face with a closed fist causing pain, redness and slight swelling to her upper left cheek area.

Dispatch advised Swenson that both Karen and Carson Combs were on probation and as a term of that probation neither were to have any alcohol. Karen denied drinking but her blood alcohol test reported a value of .15. She was arrested for obstructing an officer and violating the terms of her probation.

At 11:35 p.m. Deputy Degner arrived at the Combs's residence. Plaintiff was also given a Breathalyzer test. Swenson spoke with plaintiff who denied hitting his wife. Swenson informed plaintiff he was under arrest for battery and disorderly conduct, domestic abuse related. Deputy Degner transported plaintiff to County jail and Deputy Swenson transported Karen Combs to the jail.

Sheriff Amundson reviewed the incident reports before the battery complaint against plaintiff was signed.

MEMORANDUM

Plaintiff claims that his Fourth Amendment rights were violated because defendants Swenson, Yunk, Von Ruden and Degner unlawfully entered and searched his home without his consent. Defendants move for summary judgment on this claim. In opposing defendants' motion for summary judgment plaintiff cannot rest on the mere allegations of the pleadings but must submit evidence that there is a genuine issue of material fact for trial. Plaintiff has submitted no affidavits or evidence that contradict the affidavits submitted by the defendants. There is no genuine issue of material fact, and this case can be decided on summary judgment as a matter of law.

The Fourth Amendment prohibits unreasonable searches. Consent is a recognized exception to the warrant requirement for entry into a home. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Consent need not be verbal but may be in the form of words, gesture or conduct. United States v. Griffin, 530 F.2d 739, 741 (7th Cir. 1976).

It is undisputed that Combs turned on the light in the living room area and said "Yes, come in. Nothing happened." It is also undisputed that Combs opened the front door wider and the three

officers entered the home. The officers entry into the plaintiff's home was reasonable under the Fourth Amendment because he gave his voluntary consent.

In the alternative a warrantless entry is also reasonable under the Fourth Amendment where officers reasonably believe that a person within is in need of immediate aid. Mincey v. Arizona, 437 U.S.385 (1978). In a very recent case the United States Supreme Court held that police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. Brigham City, Utah v. Stuart, _____ S.Ct. ____ 2006 WL 1374566 (2006).

In plaintiff's case it is undisputed that the police had received a 911 call from Karen Combs' sister stating that plaintiff was beating his wife. It is also undisputed that officers knew there had been previous domestic dispute calls to the Combs' residence. Based on these facts and circumstances it was reasonable for the officers to believe that Karen Combs might be in need of immediate aid. The officers' entry into the plaintiff's home was reasonable under the Fourth Amendment based on the exigent circumstances exception.

An officer is entitled to qualified immunity if a reasonable officer could have believed that his conduct was constitutional in light of the clearly established law and the information the

officer possessed at the time the incident occurred. Saucier v. Katz, 533 U.S. 194, 202 (2001). A reasonable officer would have believed that on July 17, 2003 entry into plaintiff's home was constitutional under the Fourth Amendment because plaintiff consented or exigent circumstances existed. Defendants would be entitled to qualified immunity.

Defendants are entitled to judgment in their favor as a matter of law on plaintiff's Fourth Amendment claim and their motion for summary judgment will be granted.

Plaintiff also claims that defendant Amundson maliciously prosecuted him. Malicious prosecution is not a constitutional tort unless the state does not provide a remedy for malicious prosecution. Newsome v. McCabe, 256 F.3d 747, 750 (7th Cir. 2001). Wisconsin recognizes the tort of malicious prosecution. See Strid v. Converse, 111 Wis. 2d 418, 331 N.W. 2d 350 (1983). Accordingly, plaintiff has not stated a federal law claim for malicious prosecution.

Plaintiff may be pursuing state law claim of malicious prosecution. This Court declines to exercise continuing supplemental jurisdiction over plaintiff's state law claims pursuant to 28 U.S.C. §1367(c)(3) and United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1986). See Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993). Plaintiff's state law claim will be dismissed without prejudice.

Plaintiff also claims that the defendant conspired to violate his rights under 42 U.S.C. § 1985(3). To prevail on this claim plaintiff must show the existence of a conspiracy. A purpose of depriving a person or class of persons equal protection under the law, an act in furtherance of a conspiracy and an injury to person or property or a deprivation of a right granted to U.S. citizens. Green v. Benden, 281 F. 3d 661, 665-66 (7th Cir. 2002). Plaintiff must also show some racial, or otherwise class-based, invidiously discriminatory animus behind the conspirators' actions. Id.

Plaintiff has failed to submit evidence that supports this claim. Accordingly, defendants are entitled to judgment as a matter of law on this claim.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants against plaintiff DISMISSING his complaint and all federal law claims contained therein with prejudice and costs and all state law claims without prejudice.

Entered this 19th day of June, 2006.

BY THE COURT:

s/

JOHN C. SHABAZ
District Judge