2013

Mary D. Branch, Plaintiff-Appellant, v. Officer Timothy Gorman, et al., Defandants-Appellants: Reply Brief of Appellant

Patricia E. Roberts
William & Mary Law School, perobe@wm.edu

Pamela Palmer

Alexa Roggenkamp

Tillman J. Breckenridge

Robert M. Luck III

No. 12-3545

IN THE

United States Court of Appeals for the Eighth Circuit

Mary D. Branch,

Plaintiff-Appellant,

v.

Officer Timothy Gorman, et al.,

Defendants-Appellants.

On Appeal from the
United States District Court for the District of Minnesota
in Case No. CIV. 11-2155 (RHK/JJG)

REPLY BRIEF OF APPELLANT

PATRICIA E. ROBERTS
PAMELA PALMER
ALEXA ROGGENKAMP
William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187
757-221-3821
perobe@wm.edu

TILLMAN J. BRECKENRIDGE
ROBERT M. LUCK, III
REED SMITH LLP
1301 K Street, NW
Suite 1100, East Tower
Washington, D.C. 20005
202-414-9200
tbreckenridge@reedsmith.com

Counsel for Appellant

February 6, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

INTRODUCTION

The Defendants claim that there are no disputed facts, but neither their Brief nor their statement to the trial court that they "believe" there are "disputes of interpretation of the facts" [JA152] support such a conclusion. Material facts are in dispute and even the "undisputed facts," as Defendants claim them to be, allow a reasonable jury to determine that arguable probable cause to arrest Branch did not exist. Therefore, the Defendants are not entitled to summary judgment on their assertion of qualified immunity, the trail court's decision should be reversed and the case remanded for further proceedings.

Defendants contend that Branch's need to use the restroom, the time of day, and Branch's re-entry into the vehicle are all somehow indicative of intoxication. They further contend that these specious indicia of intoxication gave them arguable probable cause to arrest Branch for violating the Minnesota open container law when they found her husband's empty flask under the passenger seat of his care while she was riding with him. However, they do not confront *any* of Branch's arguments establishing that these facts do not lead to a reasonable inference of intoxication or the necessary probable cause to arrest Branch. Rather than address the facts and inferences in dispute, and support that analysis with sufficient case law, Defendants cite the same cases that were used in the trial court without addressing or refuting the distinctions shown in the Opening Brief.

By the same token, Defendants ignore the critical evidence weighing against any determination that a reasonable officer could believe Branch was intoxicated and in violation of the open container law. In doing so, Defendants attempt to deviate from established law requiring that probable cause be based on *all* the evidence presented and the circumstances as a whole, not simply those facts which could support arrest under some other circumstance. *United States v. Capers*, 685 F.2d 249, 251 (8th Cir. 1982). Defendants do not address any of the exculpatory evidence known to officers at the time of arrest, such as the empty water bottles in the car and the admission by Branch's husband that the flask was his.

The only significant undisputed fact that Defendants can rely on is Branch's general proximity to the flask as a passenger in the flask owner's vehicle. However, Defendants have not cited a single case finding constructive possession based on the mere proximity to an object or any other case with sufficiently analogous circumstances finding constructive possession. Simply put, the Defendants have failed to present, and Branch could not find, any case where summary judgment was granted based on such a weak set of facts, many of which Defendants admit are open to differing inferences as to whether reasonable officers would have sufficient probable cause to arrest Branch. Summary judgment was thus inappropriate, and the case should be reversed and remanded for further proceedings.

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT WHEN THERE ARE DISPUTES OF MATERIAL FACTS AND INFERENCES OVER WHETHER THERE WAS ARGUABLE CAUSE TO ARREST BRANCH

Whether arguable probable cause existed at the time of arrest is a question that must be left for the jury when, as here, there is a clear dispute of material fact concerning whether the facts and circumstances support such probable cause. *See Livers v. Schenk*, 700 F.3d 340, 352, 358-62 (2012) (finding that summary judgment was properly denied because there were questions of fact for the jury to determine). Before the trial court, Defendants freely admitted that they "believe" there are "disputes of interpretation of the facts," [JA152] and, as the Opening Brief demonstrates, there are also material disputes of the facts themselves.

Defendants mischaracterize Branch's arguments as requiring an elevated standard, but Branch readily agrees with Defendants that Defendants must prove the existence of arguable probable cause to prevail at the summary judgment stage. *See* Defendant's Br. 11. When determining if there is a material issue of fact on the potential that arguable probable cause exists, a court must engage in an analysis of "[t]he cumulative effect of all the facts and circumstances at the time of arrest," not simply the factors that might support Defendants' decision to arrest Branch. *United States v. Capers*, 685 F.2d 249, 251 (8th Cir. 1982). As Defendants correctly state, a "court may not allow a case to go forward to trial on the mere

chance that a jury will disregard all evidence and accept the unsupported speculation of a party." Defendants' Br. 19, citing *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992). But when, as here, there are material issues of fact and when further conflicting inferences can be drawn from these facts, summary judgment must be denied, because "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986); *see also Snyder v. U.S.*, 717 F.2d 1193, 1195 (8th Cir. 1983).

II. THERE ARE DISPUTES OF MATERIAL FACTS AND INFERENCES REGARDING WHETHER A REASONABLE POLICE OFFICER WOULD BELIEVE BRANCH WAS IN CONSTRUCTIVE POSSESSION OF THE FLASK

There is no dispute regarding the underlying legal standards. For qualified immunity to apply, the Defendants must have possessed arguable probable cause which was based on all the evidence presented and not simply those facts that might support arrest. *Capers*, 685 F.2d at 251. Arguable probable cause here depends on whether a reasonable officer would have believed Branch was in constructive possession of the flask. Opening Br. 11-12; Defendants' Br. 6-7. The parties further agree that constructive possession requires proof that either the item was under the exclusive control of the individual, or the individual was demonstrating conscious dominion and control over the item. *Minnesota v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975); *Minnesota v. Porter*, 674 N.W.2d

424, 427 (Minn. Ct. App. 2004). Defendants did not meet their burden to show there was arguable probable cause, based on all the evidence available to them at the time of arrest, to believe that either Branch possessed exclusive control of the flask or that Branch was demonstrating conscious dominion and control over flask.

A. A Reasonable Juror Could Find That No Reasonable Police Officer Would Believe Branch Exercised Exclusive Control Over the Flask

While having exclusive control of an item can equate to constructive possession, *Florine*, 226 N.W.2d at 611, the circumstances of Branch's arrest clearly do not fulfill the definition of exclusive control. As *Florine* states, exclusive control is when an item is found in an area "to which other people did not *normally* have access." *Id.* This is a high burden, as exclusive control is generally understood to be difficult to meet, and, in most cases, the court simply assumes that it does not apply. *See e.g. Minnesota v. Flowers*, 734 N.W.2d 239 (Minn. 2007); *Minnesota v. Lee*, 683 N.W.2d 309 (Minn. 2004); *Minnesota v. Robinson*, 517 N.W.2d 336 (Minn. 1994); *Minnesota v. Olson*, 482 N.W.2d 212 (Minn. 1992).

In *Minnesota v. Wiley*, 366 N.W.2d 265, 267 (Minn. 1985), the Minnesota Supreme Court addressed whether a defendant had constructive possession of marijuana found in his bedroom in a shared house. The Minnesota Supreme Court dismissed the exclusive control argument with a single sentence: "[t]he evidence

shows that other persons had access to the house, and in fact lived there, and that bedroom '2' was not under appellant's exclusive control." *Id.* at 270. Similarly, in *Minnesota v. Johnson*, No. A11–2256, 2012 WL 4476527 at *2 (Minn. Ct. App. Oct. 1, 2012), the court considered constructive possession of a weapon in an automobile. There the court determined that Johnson had exclusive control when he was discovered to be the *operator and sole occupant* of a vehicle, after leading police on a chase which ended at his home and after he had sole possession and control of the vehicle prior to fleeing police. *Id.* Based on these facts, the court found exclusive control over the vehicle, and thus exclusive control over the weapon inside. *Id*.

Thus, to obtain summary judgment based on exclusive control, the Defendants must show that it is not possible for a reasonable jury to find that Defendants acted unreasonably in determining that the space beneath the passenger seat was a place over which no one, apart from Branch, normally had access. However, it is clear that a jury could find that Defendants were unreasonable if they believed that Branch had exclusive control of the space underneath the passenger seat. It was not her car, she was not the driver, she was not the car's only occupant at the time the car was pulled over, and the flask was found in a location where it is reasonable to believe that she did not even know it was there (most passengers do not check under the seat when entering a car or riding with

someone else). Much like the shared house in *Wiley*, there were other regular occupants, and here, there was even another occupant at the time of the arrest.

Defendants suggest that after Branch's husband was removed from the vehicle and arrested, "the area under her seat was within her exclusive control." Defendants' Br. 14. However, Defendants plainly cannot remove the driver of the vehicle, arrest him and then immediately turn around and assert that now Branch has exclusive control. Indeed, at the time Defendants arrested the driver they also had control over Branch and presumably would have seen if Branch had done anything furtive under the seat. The car was the possession of Branch's husband and he clearly had access to the vehicle including the space under the passenger seat. Branch, at the time of the arrest, neither had exclusive control of the vehicle as a whole or the flask located underneath a seat accessible to anyone on the vehicle and it would be unreasonable for the Defendants to believe otherwise.

B. A Reasonable Juror Could Find That No Reasonable Police Officer Would Believe That Branch Had Conscious Control of the Flask

The Defendants' Brief does not address Branch's arguments concerning her lack of conscious control over the flask. Instead, Defendants appear to simply rely on Branch's proximity to her husband's flask and spend a substantial amount of time refuting minor issues about the contents and specific location of the flask. Defendants' Br. 17. However, conscious dominion and control requires much

more than mere proximity; it requires knowledge of the illegal substance, ability to control it, and intent to do so. *United States v. Serrano-Lopez*, 366 F.3d 628 (8th Cir. 2004). The standard requires a strong inference that an individual at one time physically possessed the substance and did not abandon that possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of the arrest. *Florine*, 226 N.W.2d at 610-11. Conscious dominion and control can be demonstrated in three ways: furtive movements, ability to identify the illegal object or substance, and when the individual is the sole occupant of the vehicle. *Minnesota v. Munoz*, 385 N.W.2d 373, 377 (Minn. Ct. App. 1986). None of these factors are present in this case in this case.

First, Defendants do not claim they observed Branch making any suggestive or secretive movements in an attempt to conceal the flask. Second, according to Branch, she was unaware that the flask was in the vehicle. JA135. Since Defendants claim that the location of the flask is immaterial, and concede that it was found in the passenger compartment, for the purposes of argument, Branch will assume the flask was completely under the passenger's seat out of view. Defendants' Br. 4, 11. With the flask located completely under the seat and out of Branch's view, Branch disavowing any knowledge that the flask had been there, and Branch's husband stating that the flask was his own, [JA135], a reasonable jury could determine that it was unreasonable for Defendants to believe that

Branch had constructive possession of the flask. Given these very limited facts, Defendants could have engaged in more investigation. If they had, they may have learned that, among other things, Branch had not seen the flask for an entire year because it came with a gift set her husband received for his birthday. *Id.* A reasonable jury could find that, based on the totality of these circumstances, Defendants did not possess arguable probable cause and are not entitled to qualified immunity.

Defendants make the attenuated argument that Branch showed sufficient indicia of intoxication for them to have probable cause to believe that she had consumed alcohol which in turn gave them probable cause to believe that the alcohol came from her husband's flask found in the vehicle which in turn gave them arguable probable cause to believe she was in violation of the Minnesota open container law. Defendants have not provided a single case establishing that an indicia of intoxication provides the probable cause necessary to arrest a passenger under the open container law. That is not surprising given the fact that, in cases like this, even if there were indicia of intoxication, it would no more suggest that the passenger was drinking in the car than it suggests that the passenger was drinking at the prior location before entering the car.

Moreover, the facts Defendants use to support their theory do not establish, as a matter of law, that it was reasonable to believe she was intoxicated. Common

indicia of intoxication include slurred speech, swaying movements, bloodshot eyes, and an individual who smells strongly of alcohol. *See e.g. Musgjerd v. Commissioner of Public Safety*, 384 N.W.2d 571, 574 (Minn. App. 1986); *Thomas v. Drover's Inn Associates*, CIV.02-1682(DWF/SRN), 2003 WL 22738538, at *5 (D. Minn. Nov. 13, 2003). Prior to her arrest, Branch did not exhibit any of these characteristics which might give rise to arguable probable cause. Instead of pointing to any of these common factors, Defendants articulate four factors that allegedly indicate Branch was consuming alcohol: (1) the urgent need to use a restroom; (2) time of day; (3) her re-entry of the vehicle on the driver's side; and (4) some purported argumentative nature. Defendants' Br. 15. Based on the evidence taken in the light most favorable to Branch, a jury could find that none of these factors are sufficient, taken individually or together, to lead a reasonable officer to believe that Branch was intoxicated.

While an urgent need to urinate is indicative of the consumption of liquids, it is not suggestive of the consumption of alcohol over any other liquid. Opening Br. 19. There were multiple water bottles in the vehicle and Branch was drinking water as they drove the vehicle home. JA 131-32. Defendants make no effort to explain how these facts, known to Defendants at the time of arrest, would not lead a jury to find that Branch's need to urinate was *not* an indication of intoxication. Moreover, Branch's multiple requests to urinate, whether twice or twenty times,

are of no consequence whatsoever because she was never allowed to relieve herself and the urge, therefore, would not subside. Opening Br. 19. The urge to urinate does not simply go away like a headache. Defendants do not address any of this in their brief, but it could lead a reasonable jury to conclude that the urge to urinate was not a reasonable indication of intoxication.

Likewise, the time of day is not indicative of alcohol consumption or intoxication. Defendants argue that nighttime is a more likely time for an individual to consume alcohol, but they do not provide any support for this conclusion. Nor do they account for the contrasting fact that it was a Sunday night, which is a night on which most people are less likely to drink alcohol than other nights of the week. Some courts have found that time of day may be a relevant consideration *to conduct further investigation*, but only when the time of day is specifically connected with other, more suggestive factors. *See e.g. Minnesota v. Storvick*, 428 N.W.2d 55, 60 (Minn. 1988) (stating that there was an "objective basis for believing that it was necessary to scientifically ascertain defendant's blood alcohol level" after the driver fled the scene of an accident, because, among half a dozen other factors, "it was the time of day that, when an accident such as this occurs, drinking is often found to be involved"); *Columbus v. Anderson*, 74 Ohio App. 3d 768, 770 (1991) (stating that an officer had a reasonable suspicion sufficient to conduct a field sobriety test due to "the moderate odor of alcoholic

beverage, and the time of day"). The trial court used time of day to justify an arrest, rather than to justify a field sobriety test. A reasonable jury could resolve that the failure to undertake a field sobriety test indicates that these weak indicia of intoxication are more *post hoc* rationalization than a true basis for Branch's arrest.

Moreover, the time of day, without significant connection to other activity, is not sufficient to support an inference of drinking or intoxication. For example, in *United States v. Nicholas*, the court found time of day unpersuasive. 104 F.3d 368 (table), 1996 WL 731605 at *2 (10th Cir. Dec. 20, 1996) (unpublished opinion). The Tenth Circuit stated that "the connection between the early hour and the likelihood of Mr. Nicholas's intoxication is counter-intuitive." *Id*. The court reasoned that time of day would be important if the defendant was falling asleep at the wheel or engaging in general malfeasance, but early morning hour did not make drinking a logical step. *Id.*; s*ee also Brown v. Texas*, 443 U.S. 47, 53 (1979) (concluding that nighttime activity per se is not sufficient to create reasonable suspicion of criminal activity).

Here, Branch was an unassuming passenger, not engaging in any criminal or otherwise inappropriate activity. While she was traveling in a vehicle with her husband at night, Branch provided a very reasonable explanation for the time of day completely unrelated to any indicia of intoxication. Shortly after midnight, she was returning home from a church event she attended with her husband that

evening. JA132. There is simply nothing related to the time of day to increase the likelihood that Branch was intoxicated and certainly the time of day could not give Defendants arguable probable cause to arrest Branch for a violation of the open container law based on some assumption that she had been drinking alcohol out of her husband's flask.

Branch's reentry of the vehicle on the driver's side and purported belligerent behavior also are no indication of intoxication when viewed in the light most favorable to Branch. As Branch noted in the Opening Brief [at 20], and Defendants fail to even address, Officer Garbisch himself testified that Branch's purported belligerence was typical of an average person in a police situation. JA 91-92. Officer Garbisch testified that Branch's uncooperativeness constituted "questioning what I was doing, if I knew what I was doing, why I was doing it, that sort of thing," and said that such questions were very typical of people who were being detained by the police, because they are generally not happy to be there. JA 90-91. As with the other purported factors indicating intoxication allegedly sufficient to give rise to arguable probable cause, Branch's actions indicate nothing more than any typical person detained by the police. Given that Branch's reaction was the typical reaction of someone who is being held by the police, a jury could find it unreasonable for those same officers to conclude that Branch's behavior was indicative of intoxication.

None of the purported indicia of intoxication that Defendants have rehashed in their brief indicate Branch was intoxicated at the time of the arrest and they certainly do not demonstrate arguable probable cause that Branch had constructive possession of the flask. Simply repeating the trial court's erroneous recitation is not enough. Defendants should have addressed the reasoning establishing that these facts are not indicia of intoxication when taken in the light most favorable to Branch. But they apparently have no response. That is unsurprising because there is no response—a reasonable jury could find the officers' purported belief that Branch was intoxicated to be *un*reasonable under the circumstances.

Given the disputes of material facts on Defendants' only purported justification for arresting Branch and the disputed inferences drawn from those facts, summary judgment in Defendants' favor was improper.

CONCLUSION

For the foregoing reasons, the grant of summary judgment to the Defendants-Appellees in this case should be reversed and the case should be remanded for further proceedings.

Respectfully Submitted

/s/ Tillman J. Breckenridge
Tillman J. Breckenridge
Robert M. Luck III
REED SMITH LLP
1301 K Street, NW
Suite 1100, East Tower
Washington, D.C. 20005
202-414-9200
tbreckenridge@reedsmith.com

Patricia E. Roberts
Pamela Palmer
Alexa Roggenkamp
William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795
757-221-3821
perobe@wm.edu

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [X] this brief contains [*3,467*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2007*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: February 6, 2013

/s/ Tillman J. Breckenridge
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 6th day of February, 2013, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Sarah C.S. McLaren
Timothy S. Skarda
MINNEAPOLIS CITY ATTORNEY
350 South Fifth Street, Room 210
Minneapolis, Minnesota 55415
(612) 673-2183

Counsel for Appellees Officers Timothy Gorman and Christopher Garbisch

Marc M. Berg
James C. Selmer
JAMES C. SELMER & ASSOCIATES, P.A.
500 Washington Avenue, South
Suite 2010
Minneapolis, Minnesota 55415
(612) 338-6005

Counsel for Appellee Minneapolis Department of Civil Rights

I further certify that the Reply Brief of Appellant has been scanned for viruses using [Symantec Endpoint Protection], and according to the program is free of viruses.

/s/ Tillman J. Breckenridge
Counsel for Appellant