STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1585

Tory Michael Connor,
Appellant,

vs.

City of La Crescent, et al.,
Respondents,

William Von Arx,
in his individual capacity as a La Crescent City Attorney,
Respondent.

Filed June 6, 2011
Affirmed
Collins, Judge[*]

Houston County District Court
File No. 28-CV-09-1276

Tory Michael Connor, Caledonia, Minnesota (pro se appellant)

Jana O'Leary Sullivan, League of Minnesota Cities, St. Paul, Minnesota (for respondents City of La Crescent, et al.)

Mark A. Bloomquist, Erin D. Doran, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent William Von Arx)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

In this appeal from summary judgment, appellant argues that the district court erred in dismissing appellant's state tort claims and federal civil-rights claims against two police officers, the city prosecutor, and the city employer. Because we conclude that respondents are immune from suit, we affirm.

FACTS

Respondent Michael Ernster, a LaCrescent police officer, was on patrol early on April 14, 2009, when he saw a car pull out of a driveway in front of him and make a sharp, fast turn. Officer Ernster followed the car and watched as it was driven into another driveway and its lights were turned off. Officer Ernster parked next to the driveway. As he approached the car, appellant Tory Michael Connor got out of the front passenger door, and G.B. got out of the rear passenger door. The two then fled in opposite directions. Officer Ernster made sure that the car had no other occupants and then caught up to Connor and placed him in handcuffs. Another police officer caught G.B. and arrested her. The car was registered to G.B.'s father.

Connor and G.B. showed signs of impairment and both denied driving the car that night. Connor refused to complete field sobriety tests and refused a breath test after he was read the implied-consent advisory. G.B.'s performance on the field sobriety tests indicated that she was impaired and a breath test at the police department showed her alcohol concentration as .09.

On April 16, Connor waived his *Miranda* rights and told Officer Ernster that G.B. was the driver and that G.B. pulled into the driveway when she saw the police car behind them and climbed into the backseat. In his police report and recorded interview with Connor, Officer Ernster stated that he did not believe Connor could have climbed from the driver's seat to the passenger seat and exited feet first based on his physical stature. But he also noted that he did not see either occupant get out of the driver's seat and could not be sure who was driving. Officer Ernster issued Connor citations for underage consumption of alcohol and fleeing a peace officer on foot.

Connor was subpoenaed to testify on July 7, 2009, in the civil implied-consent proceeding in which G.B. sought judicial review of her driver's license revocation, but Connor did not appear at the hearing. On July 10, 2009, Officer Ernster spoke with respondent La Crescent city attorney William Von Arx and then completed the forms to revoke Connor's driver's license under the implied consent law. Following the discussion, Von Arx also issued a complaint charging Connor with several driving-while-impaired (DWI) offenses. The complaint included a statement of probable cause signed by respondent police officer Luke Ahlschlager based on the facts described by Officer Ernster. Connor made his initial appearance in district court on July 24, 2009, and was then ordered by the district court to report to the sheriff's office to complete booking procedures.

On September 16, 2009, Connor moved to dismiss the DWI charges for lack of probable cause. After a hearing, the district court granted the motion and also dismissed

an additional driving-related charge for lack of probable cause. On October 29, 2009, G.B. admitted driving the car on April 14.

Connor commenced a civil suit, alleging malicious prosecution, abuse of process, and false arrest against Officers Ernster and Ahlschlager, and against respondent City of La Crescent on a theory of vicarious liability. Connor also alleged violations of his civil rights under 42 U.S.C. §§ 1983, 1985 (2006) against Von Arx and Officer Ernster. Respondents moved for dismissal or summary judgment, arguing that Connor's claims were barred based on the doctrines of prosecutorial, official, vicarious, and qualified immunity. After a hearing, the district court granted summary judgment in favor of all respondents on all charges. This appeal followed.

D E C I S I O N

On appeal from summary judgment, this court asks whether there are genuine issues of material fact and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). To establish a genuine issue of material fact, the nonmoving party must do more than rest on mere averments or "present[] evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

I.

We first address Connor's claims of malicious prosecution, abuse of process, and false arrest against Officers Ernster and Ahlschlager, and the City of La Crescent.

Official immunity provides a public official with a defense to state-law claims. *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006). The doctrine protects a public official charged by law with duties requiring judgment or discretion, unless the official is guilty of willful or malicious wrong. *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). The purpose of the official-immunity doctrine is to protect public officials "from the fear of personal liability that might deter independent action and impair effective performance of their duties." *Elwood v. Cnty. of Rice*, 423 N.W.2d 671, 678 (Minn. 1988).

Whether to apply official immunity is a question of law that we review de novo. *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 673 (Minn. 2006). A defense of immunity includes immunity from suit, not just liability, and immunity from suit is effectively lost if a suit is erroneously permitted to go to trial. *Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 218 (Minn. 1998); *McGovern v. City of Minneapolis*, 475 N.W.2d 71, 72 (Minn. 1991).

To determine whether official immunity applies, we must first identify the precise governmental conduct at issue. *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 656 (Minn. 2004). Then we determine whether the conduct at issue involves ministerial or discretionary duties. If the duties are discretionary, we must decide whether the officials acted willfully or maliciously. *Elwood*, 423 N.W.2d at 679.

Connor identifies the driving-related charges against him as the unlawful conduct underlying his malicious-prosecution and abuse-of-process claims. But the initiation of charges is in the province of the prosecutor. *See State v. Clow*, 600 N.W.2d 724, 728 (Minn. App. 1999) (stating that prosecutor commences adversary proceedings by

charging defendant), *review denied* (Minn. Oct. 21, 1999). We presume, therefore, that Connor is challenging the officers' roles in providing and signing the statement of probable cause on which the charges were based.

A ministerial act is one that is "absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Cook v. Trovatten*, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937) (quotation omitted). Such an act leaves nothing to discretion; it is "a simple, definite duty arising under and because of stated conditions." *Larson v. Indep. Sch. Dist. No. 314*, 289 N.W.2d 112, 119 (1979) (quotation omitted). In contrast, a duty is discretionary if it involves "more individual professional judgment that necessarily reflects the professional goal and factors of a situation." *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (1998).

Although some duties of police officers, even in emergency situations, are ministerial, officers may be entitled to immunity for conduct requiring fact-based judgments. *Compare Mumm*, 708 N.W.2d at 491 (holding that police pursuit in car was ministerial), *with Kelly v. City of Minneapolis*, 598 N.W.2d 657, 665 (Minn. 1999) (holding that conduct to execute an arrest was discretionary), *Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992) (holding that decision to engage in high-speed vehicular chase of criminal suspect was discretionary), *Johnson v. Morris*, 453 N.W.2d 31, 42 (Minn. 1990) (holding that shooting tires on fleeing vehicle and handcuffing suspect was discretionary), *and Elwood*, 423 N.W.2d at 678 (holding that warrantless entry and restraint in response to domestic-violence complaint was discretionary).

The record shows that Officer Ahlschlager's only involvement in the case was to sign the statement of probable cause based on the facts provided by Officer Ernster. The statement of probable cause required Officer Ahlschlager to assess whether the facts—that two people, a stout male and a female, each displaying signs of impairment, got out of a car on the passenger side; that both denied driving; that there were no other occupants of the car; and that the officer at the scene did not see who had been in the driver's seat—constituted probable cause supporting the belief that Connor was driving while impaired on April 14. Probable cause to arrest exists "where the facts would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person under consideration is guilty of a crime." *State v. Carlson*, 267 N.W.2d 170, 173 (Minn. 1978). The process of assessing whether probable cause exists is inherently fact specific and judgment dependent and therefore discretionary, rather than a "duty arising from fixed and designated facts." *Cook*, 200 Minn. at 224, 274 N.W. at 167 (quotation omitted). Therefore, Officer Ahlschlager's signing of the statement of probable cause to support the driving-related charges is entitled to official immunity unless it was willful or malicious.

Malice in the context of official immunity means intentionally committing an act that the official has reason to believe is legally prohibited and is synonymous with willful. *Kelly*, 598 N.W.2d at 663; *Rico*, 472 N.W.2d at 107. "The exception does not impose liability merely because an official *intentionally* commits an act that a court or a jury subsequently determines is a wrong. Instead, the exception anticipates liability only when an official intentionally commits an act that he or she then has reason to believe is

prohibited." *Rico*, 472 N.W.2d at 107. The issue of malice has been characterized as an "objective inquiry into the legal reasonableness of an official's actions." *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994).

"Mere allegations of malice are not sufficient to support a finding of malice, as such a finding must be based on specific facts evidencing bad faith." *Semler v. Klang*, 743 N.W.2d 273, 279 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Feb. 19, 2008). The determination of whether an official's actions were malicious or willful may be resolved by summary judgment. *Elwood*, 423 N.W.2d at 679; *Reuter v. City of New Hope*, 449 N.W.2d 745, 751 (Minn. App. 1990), *review denied* (Minn. Feb. 28, 1990). The record contains no evidence that Officer Ahlschlager signed the statement of probable cause knowing that the factual basis was insufficient to support probable cause, or any other indicator of bad faith.

Officer Ernster provided the facts on which the statement of probable cause was based. He discussed the case with Von Arx before the complaint was issued, and he initiated the revocation of Connor's driver's license under the implied-consent law based on the discussion. Initially, Officer Ernster decided to issue citations for non-driving offenses but he was later instrumental in the process of bringing DWI charges against Connor. These actions require fact-based judgments and are discretionary in nature.

The question of whether Officer Ernster acted maliciously is easily conflated with the district court's ultimate determination of the lack of probable cause to support the driving offenses based on evidence that Officer Ernster did not believe Connor was

driving the car. And Connor argues that the charges were instigated to punish him for not appearing at G.B.'s implied-consent hearing.

Officer Ernster may have subjectively doubted that Connor was driving the car and subjectively believed that it was more likely that G.B. was driving. But given that both occupants denied driving and that Officer Ernster did not see which of them had been in the driver's seat, it is objectively reasonable that Officer Ernster decided that the facts supported an honest and strong suspicion that Connor was driving. Although the district court later concluded that this determination was incorrect, there is no evidence that Officer Ernster intentionally provided the facts for the statement of probable cause when he should have known that these facts were legally insufficient. The temporal connection Connor relies on is not enough to show bad faith given that both occupants were continuing to deny driving when the charges were brought. We decline to adopt a test for malice that would subject peace officers to civil suit any time charges were dismissed for lack of probable cause without evidence that their actions were legally unreasonable.

Connor bases his claims against Officers Ernster and Ahlschlager for false arrest on his compelled compliance with the booking procedures on July 24, 2009. But the officers did not order this procedure; the district court did so pursuant to Minn. Stat. § 299C.10 (2010), which requires collection of fingerprints and identifying information for anyone charged with a DWI offense. The district court is not a defendant in the lawsuit, and if it were, it would be protected by absolute judicial immunity. *See Hoppe v. Klapperich*, 224 Minn. 224, 234, 28 N.W.2d 780, 787-88 (1947) (stating that "for acts

done in the exercise of judicial authority . . . an officer or judge shall not be held liable to any one in a civil action, so that he may feel free to act upon his own convictions, uninfluenced by any fear or apprehension of consequences personal to himself" (quotation omitted)). And as discussed above, Officers Ernster and Ahlschlager are immune from suit for their conduct in providing and signing the statement of probable cause, which supported the charges on which Connor was booked.

Vicarious official immunity protects a municipality from suit based on the official immunity of its employee on the rationale that "it would be anomalous to impose liability on the municipality for the very same acts for which its employee receives immunity." *Pletan*, 494 N.W.2d at 42. Because the officers are entitled to official immunity from Connor's tort claims, the doctrine of vicarious official immunity bars Connor's claims against City of La Crescent. *See Wiederholt*, 581 N.W.2d at 316-17 (discussing doctrine).

In sum, we conclude that the district court did not err in granting summary judgment in favor of Officers Ernster and Ahlschlager and City of La Crescent on Connor's tort claims.

II.

Connor argues that the district court improperly dismissed his claims against Von Arx and Officer Ernster for violations of his civil rights under 42 U.S.C. §§ 1983, 1985. We disagree.

Prosecutors are absolutely immune from suit under sections 1983 and 1985 for their conduct in initiating charges. *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S. Ct. 984,

995 (1976); *Keating v. Martin*, 638 F.2d 1121, 1122 (8th Cir. 1980) (per curiam), *as amended* (8th Cir. Dec. 31, 1980); *Erickson v. Cnty. of Clay*, 451 N.W.2d 666, 670 (Minn. App. 1990). The record shows that Officer Ernster and Von Arx had a discussion on July 10, 2009, and that thereafter Von Arx decided to charge Connor for driving-related offenses. The record does not show that Von Arx was advising the police in their investigation, which took place between April 14 and 16, or was engaged in any activity except deciding to initiate the driving-related charges. The decision to bring criminal charges against a defendant is "intimately associated with the judicial phase of the criminal process" and protected by prosecutorial immunity. *Imbler*, 424 U.S. at 430, 96 S. Ct. at 995; *see also Anderson v. Larson*, 327 F.3d 762, 768 (8th Cir. 2003). The district court, therefore, did not err in granting summary judgment in favor of Von Arx on Connor's federal civil-rights claims.

Finally, we address Connor's federal civil-rights claims against Officer Ernster. Qualified immunity is a defense available to public officials sued for damages under federal law. *See Mumm*, 708 N.W.2d at 483 (discussing immunity defense for claim under 42 U.S.C. § 1983). Qualified immunity shields government officials from civil liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2729 (1982). In conducting a qualified-immunity analysis, we must determine (1) if the facts alleged show that the public official's conduct violated a constitutional right and (2) if that right is clearly established. *Pearson v. Callahan*, 129

S. Ct. 808, 815-16, 818 (2009) (holding that a court may analyze the second prong first and find this to be dispositive without concluding that a constitutional right was violated).

Connor argues that Officer Ernster violated his Fourth Amendment rights by initiating the revocation of his driver's license. But Connor has no constitutional right to a license—only a constitutional right to due process when it is revoked. *See Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589 (1971) (stating that "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment"). Connor was afforded due process, and the state rescinded the revocation and reinstated his driver's license.

Connor asserts that he was arrested without probable cause when he was required to complete the booking procedure. It is not clear that compliance with pretrial proceedings constitutes a seizure under the Fourth Amendment. *See Technical Ordinance, Inc. v. United States*, 244 F.3d 641, 651 (8th Cir. 2001) (concluding that obligation to post bond and appear before court to answer charges did not clearly amount to a seizure); *Bristow v. Clevenger*, 80 F. Supp. 2d 421, 429-30 (M.D. Pa. 2000) (holding that being fingerprinted and photographed and making required court appearance was not a seizure and distinguishing bail requirement and restricted travel in *Gallo v. City of Phila.*, 161 F.3d 217 (3d Cir. 1998), *as amended* (3d. Cir. Dec. 7, 1998)). Connor was never held in custody and had no restrictions on his movement. *Cf. Murphy v. Lynn*, 118 F.3d 938, 945 (2d Cir. 1997) (concluding that obligation to appear in court and restriction on interstate travel constituted seizure). Therefore, Connor did not allege a violation of a clearly established constitutional right based on the booking procedures.

Finally, for an allegation of malicious prosecution to constitute a claim under section 1983 there must be a constitutional violation such as a deprivation of liberty or property without the constitutionally required procedures. *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990). The only deprivation of property Connor alleged is the loss of his driver's license, but he was afforded due process pursuant to the implied-consent law and his license was reinstated. And the only deprivation of liberty alleged is compliance with the booking procedure, which does not amount to a violation of a clearly established constitutional right.

Outrageous conduct by law-enforcement authorities that "shocks the conscience" might violate due process even without a procedural violation. *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209 (1952). The conduct at issue falls short of this high bar. Officer Ernster was reasonable in believing that the facts objectively supported probable cause that Connor had been the driver even if he subjectively believed it was more likely that G.B. had been driving. Officer Ernster's conduct in providing the facts for the statement of probable cause, which matched his police report, was not so outrageous as to amount to a violation of substantive due process. *See Gunderson*, 904 F.2d at 410 (discussing high standard).

Connor did not raise a claim of racial discrimination in his complaint or at any time before the district court, and we therefore decline to review it for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that issues not raised before the district court are waived on appeal).

Because Connor failed to allege a violation of a clearly established constitutional right, Officer Ernster was entitled to qualified immunity from Connor's federal claims. Thus the district court did not err in granting summary judgment in favor of Officer Ernster on Connor's section 1983 and 1985 claims.

Affirmed.