

United States
Tenth

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FEB 1 1991

ROBERT L. HOECKE
Clerk

DAVID LINDSEY; CYNTHIA LINDSEY, husband)
and wife; TERESA M. LINDSEY; MICHAEL D.)
LINDSEY, minor children by and through)
their parents, David and Cynthia)
Lindsey,)

Plaintiffs-Appellants,)

v.)

SARENE COX, in her official and)
individual capacity,)

Defendant-Appellant,)

and)

PATRICIA LINCOLN,)

Defendant.)

No. 89-6135
(D.C. No. 88-555-W)
(W.D. Okla.)

DAVID LINDSEY; CYNTHIA LINDSEY, husband)
and wife; TERESA M. LINDSEY; MICHAEL D.)
LINDSEY, minor children by and through)
their parents, David and Cynthia)
Lindsey,)

Plaintiffs-Appellees,)

v.)

SARENE COX, in her official and)
individual capacity,)

Defendant,)

and)

PATRICIA LINCOLN, individually,)

Defendant-Appellant.)

No. 89-6147
(D.C. No. 88-555-W)
(W.D. Okla.)

DAVID LINDSEY; CYNTHIA LINDSEY, husband)
and wife; TERESA M. LINDSEY; MICHAEL D.)
LINDSEY, minor children by and through)

their parents, David and Cynthia
Lindsey,

Plaintiffs-Appellants,

v.

OKLAHOMA CITY, OKLAHOMA, a corporation;
SARENE COX, in her official and
individual capacity; PATRICIA LINCOLN,
individually,

Defendants-Appellees.

No. 89-6396
(D.C. No. 88-555-W)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before MOORE, BARRETT, Circuit Judges, and SPARR,** District
Judge.

**Honorable Daniel B. Sparr, District Judge, United States
District Court for the District of Colorado, sitting by
designation.

These appeals arise from a series of events culminating in
the seizure of David and Cynthia Lindsey's children from their
home in Oklahoma City, Oklahoma.¹ Defendant Sarene Cox is a
detective for the city of Oklahoma City who ordered that the

* This order and judgment has no precedential value and shall
not be cited, or used by any court within the Tenth Circuit,
except for purposes of establishing the doctrines of the law of
the case, res judicata, or collateral estoppel. 10th Cir. R.
36.3.

¹ After examining the briefs and appellate record, this panel
has determined unanimously that oral argument would not materially
assist the determination of these appeals. See Fed. R. App. P.
34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered
submitted without oral argument.

children be taken into protective custody. Defendant Patricia Lincoln is a social worker who was involved in the seizure.

The decision to take the children into custody was made after a police investigation revealed accusations of child pornography and molestation involving the Lindseys. The children were taken during a search of the Lindsey home which was conducted pursuant to a warrant. The Lindseys were later charged with "indecent liberties with a minor" under Oklahoma law. See Okla. Stat. tit. 21, § 1123 (1983). However, the district attorney declined to prosecute the case, and the children were returned after nine days of protective custody.

The Lindsey family filed this suit pursuant to 42 U.S.C. § 1983, alleging the defendants had deprived them of various constitutional rights. Defendant Oklahoma City filed a motion for summary judgment on the merits. The individual defendants filed summary judgment motions urging immunity defenses. The Lindseys filed cross motions on the merits. On April 19, 1989, the district court issued an order denying plaintiffs' motions and granting defendants' motions in part. All the parties have appealed from the rulings of the district court. We affirm.

I.

In August 1986, police began an investigation into alleged child pornography and molestation at the Lindsey residence. The investigation began after a child (D.D.)² told police the Lindseys had taken pornographic pictures of several children in the

² For the protection of the children involved, any minors identified in this order and judgment will be referred to by their initials.

neighborhood. Police were interviewing D.D. as part of a separate investigation into allegations that he molested his younger cousin. He identified the Lindseys only after police began questioning him about the charges involving his cousin. The record reveals D.D. may have been accused of molesting other children in the past. Interviews with the neighborhood children allegedly involved failed to confirm D.D.'s allegations. However, the mother of one of the children told police two of the alleged victims confirmed the molestation to her.

Based on the information received from D.D., Detective Cox prepared an affidavit to serve as the basis for search and arrest warrants against the Lindseys. The search warrant was designed to seize "photos of explicit sexual acts involving minors, both developed and undeveloped film, also including Polaroid photographs." See Rec. Vol. I at doc. 7 Exhibit II. The affidavit did not contain any information regarding D.D.'s past or his credibility. A district court judge issued both warrants.

On August 20, 1986, Ms. Cox went to the Lindsey home to execute the search warrant. Social worker Lincoln accompanied her. When they arrived, the two Lindsey children were home, in the care of a baby-sitter. The children were sent to a police car with Ms. Lincoln during the search. The search discovered various sexual devices, lotions and magazines, all of which were seized. Police also found twenty-eight videotapes, three photographs, and an undeveloped roll of film. None of the materials were illegal or connected to child pornography.

During the search, Ms. Cox ordered the children be taken into protective custody. She based this decision on her assessment that an emergency situation was present in the Lindsey home. Ms. Lincoln then took the children to the Department of Human Services (DHS). The next day, Detective Cox returned to the Lindsey residence to arrest David and Cynthia Lindsey. That same day, a special judge held a custody hearing regarding the children and determined they would remain with DHS. Both Ms. Cox and Ms. Lincoln were instrumental in initiating the hearing. The Lindseys were not present, although they were represented by counsel.

After reviewing the case, the Oklahoma City district attorney decided not to prosecute the Lindseys. The children were returned to their custody on August 29, 1986. The seized materials were returned on September 18, 1986.

Plaintiffs brought this action on April 4, 1988. At the time the district court considered the cross motions for summary judgment, the following claims remained: 1) against the city of Oklahoma City for improper training and supervision; 2) against Detective Cox for arrest without probable cause; 3) against Detective Cox for improper seizure of items not included in the search warrant; 4) against Ms. Cox and Social Worker Lincoln for the seizure of the children; and 5) against Ms. Cox and Ms. Lincoln for conspiracy to prevent the Lindseys from attending the child custody hearing.

The individual defendants sought either absolute or qualified immunity on all claims. The city argued plaintiffs' claim failed as a matter of law. The district court ruled in favor of the

city. It also held the individual defendants were absolutely immune from suit for any activities associated with the ex parte custody hearing. However, the court held factual issues precluded granting summary judgment on the issues related to seizure of the children and probable cause for the arrest. The court also held Ms. Cox retained no immunity for the seizure of items from the Lindsey home. Finally, the court granted defendants' motions for summary judgment on the conspiracy claim.³ Each party has appealed the rulings decided contrary to its position. We will address each of these arguments in turn.

II.

A. Standard of Review

The district court's order was based on cross motions for summary judgment. On appeal, we review the granting of a motion for summary judgment de novo, and apply the same standards as the district court. Schalk v. Gallemore, 906 F.2d 491, 494 (10th Cir. 1990). Summary judgment is appropriate only when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). It is with these principles in mind that we examine the issues presented.

B. Liability of the City of Oklahoma City

The Lindseys have alleged the city is liable for the improper training and supervision of the two individual defendants. Under certain circumstances, a municipality can be held liable for the failure to train under section 1983. City of Canton v. Harris,

³ Plaintiffs have not appealed this ruling.

109 S. Ct. 1197, 1204 (1989). However, there must be a direct causal link between an unconstitutional policy and the alleged deprivation. See Monell v. Department of Social Servs. of New York, 436 U.S. 658, 692 (1978). Respondeat superior cannot form the basis for holding a municipality liable for civil damages. Id.

To prevail, plaintiffs must show the failure to train amounted to deliberate indifference to the rights of persons with whom the defendants came into contact. Harris, 109 S. Ct. at 1204. In Harris, the Supreme Court characterized the inquiry as follows:

Monell's rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible. That much may be true. The issue in a case like this one, however, is whether that training is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." . . .

In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program.

109 S. Ct. at 1205-06 (footnote omitted). Thus, in order to defeat summary judgment, plaintiffs have the burden of submitting some genuine issue of material fact indicating city training was inadequate and, therefore, caused an unconstitutional deprivation.

Mistakes made by these officers cannot form the basis for a section 1983 action.⁴

Moreover, only those officials who have final policymaking authority may subject the municipality to section 1983 liability. City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988). A subordinate does not become a policymaker merely because she exercises discretion in her position. Id. at 126. Rather, plaintiffs must show real authority to make final decisions for the municipality.

Plaintiffs have identified three alleged unconstitutional policies.

1. That [the Oklahoma City Police Department] has no policy or training requiring police officers to disclose matters bearing on the credibility of complaining witnesses;
2. That OCPD officers are affirmatively trained that allegations made by ten year olds are automatically to be believed;
3. That OCPD provides absolute discretion to policy officers in removing children from a home without training as to the legally relevant standards in exercising that discretion.

Plaintiffs rely on the deposition testimony of defendant Cox, as well as Lt. Jewell Smith, to support these assertions. Lt. Smith, however, is not a policymaker for the city. Rather, she was produced for deposition in response to plaintiffs' discovery request for someone who knew the background of the case, as well

⁴ During the pendency of this appeal, plaintiffs filed a motion to strike material from the record. Specifically, plaintiffs sought to delete material from defendant Cox's brief. All of the quoted material was designated in the record. However, some of it was not actually before the district court. We do not believe any of the cited passages are dispositive of the issues presented in this case.

as the policies and procedures of the police department. Plaintiffs did not request the deposition of a policymaker. Because Lt. Jewell and Detective Cox are not policy-makers, municipal liability cannot attach by virtue of their testimony. See Praprotnik, 485 U.S. at 123.

Moreover, plaintiffs have not identified specific facts to support their assertion that these are unconstitutional policies of the city. Once the city properly supported its motion for summary judgment, it was incumbent upon the plaintiffs to come forward with specific facts to show the city's alleged policies were "deliberately indifferent" to the rights of third parties. See Brown v. Parker-Hannifin Corp., 746 F.2d 1407, 1412 (10th Cir. 1984). They failed to do so. In addition, there is no evidence to connect these alleged policies with the constitutional deprivation plaintiffs have alleged. Consequently, we affirm the district court's grant of summary judgment on this issue.

C. Seizure of the Lindsey Children

This issue requires a two-part inquiry. First, we must address the immunity status of the two individual defendants for their participation in the ex parte hearing before the special judge. Second, we must determine that same status as regards the actual seizure of the children. We review these issues separately.

1. Immunity status arising from the ex parte judicial hearing

Absolute immunity defeats a lawsuit at the outset, so that the officials involved will be protected from the burdens of litigation. See Davis v. Passman, 442 U.S. 228, 236 (1979). This

immunity "serves the important public policy goal of protecting officials performing important discretionary governmental functions from the threat of civil liability that may disrupt the decisionmaking process." Spielman v. Hildebrand, 873 F.2d 1377, 1381 (10th Cir. 1989). However, absolute immunity is granted sparingly, as it frees government officials from the obligation of answering for their actions in a court of law. See Forrester v. White, 484 U.S. 219, 223-24 (1988). See also Snell v. Tunnell, No. 88-2879, slip op. at 32 (10th Cir. Nov. 30, 1990)("Absolute immunity has its costs because those with valid claims against dishonest or malicious government officials are denied relief").

Social workers retain absolute immunity only for "advocacy functions" which are an intimate part of the judicial process. See Snell, slip. op. at 37; Spielman, 873 F.2d at 1382-83; see also Meyers v. Contra Costa County Dep't of Social Servs., 812 F.2d 1154, 1156-57 (9th Cir.)(social workers performing the function of initiating dependency proceedings are accorded absolute immunity), cert. denied, 484 U.S. 829 (1987). Likewise, police officers are absolutely immune from suit where they perform as an "integral part of the judicial process." Briscoe v. LaHue, 460 U.S. 325, 335-36, (1983); see also Valdez v. City & County of Denver, 878 F.2d 1285, 1288 (10th Cir. 1989)(absolute immunity granted to officers carrying out the judicial functions of the court).

Detective Cox and Social Worker Lincoln played important roles in the custody disposition in this case. They initiated the proceedings and testified at the hearing. In fact, we assume they

were the central witnesses. In this context, their actions were similar to those of a prosecutor. Therefore, they are entitled to absolute immunity on this aspect of plaintiffs' claim. See Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976) (prosecutors are entitled to absolute immunity for actions taken in the scope of their duties as prosecutors). Consequently, we affirm the district court on this issue.⁵

2. Immunity status arising from the seizure of the Lindsey children

Ms. Cox and Ms. Lincoln both urged the district court to grant them absolute immunity or, in the alternative, qualified immunity as a matter of law, for their involvement in the seizure of the children. The trial court ruled they were entitled only to qualified immunity, and that factual issues precluded granting defendants' summary judgment motions. We agree.

Where governmental officials are performing investigative, rather than prosecutorial functions, they are only entitled to qualified immunity. See Spielman, 873 F.2d at 1382-83; see also Rex v. Teeples, 753 F.2d 840, 843-44 (10th Cir.) (prosecutor performing "police-related" work entitled to qualified immunity), cert. denied, 474 U.S. 967 (1985). Here, the individual defendants were performing investigative functions when they

⁵ Defendant Lincoln asserts the collateral estoppel doctrine bars review of this claim because the state court judge approved defendants' actions at the custody hearing. We need not address this issue in light of our disposition. Moreover, we have reviewed the entire record and cannot locate any documents to indicate this issue was raised and argued in the district court. We will not review issues on appeal which were not properly preserved. See Farmers Ins. Co. v. Hubbard, 869 F.2d 565, 570 (10th Cir. 1989).

seized the children. They were in the process of searching the premises for evidence of a crime. We must now proceed to determine whether the individual defendants are actually entitled to the qualified immunity they seek under the particular circumstances of this case.⁶

The seminal standard for considering a grant of qualified immunity is found in Harlow v. Fitzgerald, 457 U.S. 800 (1982).

The Harlow test is stated as follows:

"In an attempt to balance the need to preserve an avenue for vindication of constitutional rights with the desire to shield public officials from undue interference in the performance of their duties as a result of baseless claims, the [Harlow] [c]ourt has adopted an objective test to determine whether the doctrine of qualified immunity applies". The test for qualified immunity is whether defendants violated "clearly established statutory or constitutional rights of which a reasonable person would have known. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." . . .

. . . Once a defendant raises the defense of qualified immunity as a defense to an action, "[t]he plaintiff carries the burden of convincing the court that the law was clearly established." . . . Only after plaintiff has shown a violation of a clearly established right does the defendant assume the normal burden of a movant for summary judgment of establishing that no material facts remain in dispute that would defeat her or his claim of qualified immunity.

Powell v. Mikulecky, 891 F.2d 1454, 1456-57 (10th Cir. 1989)(citations omitted); see also Snell, slip op. at 56.

⁶ Ms. Lincoln asserts she should not be held liable for the seizure because detective Cox actually ordered it. However, Ms. Lincoln was personally involved and therefore subject to potential section 1983 liability. See Coleman v. Turpen, 697 F.2d 1341, 1346 n.7 (10th Cir. 1983); see also McClelland v. Facticeau, 610 F.2d 693, 696 (10th Cir. 1979) (recognizing that the language in section 1983 "is broader than direct personal involvement").

Here, the clearly established law involves parents' substantial liberty interest in the custody of their children.⁷ Stanley v. Illinois, 405 U.S. 645, 652 (1972). The due process clause unquestionably protects this parent/child relationship. See Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 842 (1977); Spielman, 873 F.2d at 1383. The focus is necessarily on what process is due, Spielman, 873 F.2d at 1385, and whether the actions taken in this case were objectively reasonable. See Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 648 (10th Cir. 1988).

Oklahoma statute provides that police or a court officer may take a child into protective custody "whose surroundings are such as to endanger his welfare." Okla. Stat. tit. 10, § 1107(c) (1982). When a child is taken into custody pursuant to this section, a hearing must occur within twenty-four hours to determine if probable cause exists to detain the child. Id.

Plaintiffs were provided this due process protection. The parties do not dispute that a hearing was held within twenty-four hours pursuant to Oklahoma statute. The real dispute in this case is whether an emergency situation existed at the Lindsey home. In particular, we must address whether it was objectively reasonable for Detective Cox to conclude that seizure of the children was appropriate. See Pueblo Neighborhood Health Centers, Inc., 847

⁷ The district court identified Okla. Stat. tit. 10, § 1107(c) as the clearly established law in this case. However, that statute is not a right of the plaintiffs. See Harlow, 457 U.S. at 818-19. Rather, it is the perceived justification for the governmental conduct. The right which plaintiffs allege is to the custody of their children.

F.2d at 648 ("Under the Harlow standard, the focus is on the 'objective reasonableness' of the defendant's conduct.") We agree with the district court that factual issues preclude granting defendant's summary judgment motion.

The record provides little guidance as to why the children were taken into custody or on what basis Detective Cox determined their welfare was in danger. Further, it is unclear when the decision was made to take the children. Moreover, although Ms. Cox stated she took the children into custody because of the allegations against their parents, Rec. Vol. VI at 111, there is no testimony regarding what evidence prompted her to do so. On this record, we cannot say as a matter of law that Ms. Cox's decision to seize the children was objectively reasonable. We agree with the district court that further discovery is necessary. Consequently, Ms. Cox must stand trial on this claim. See DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 719 (10th Cir. 1988).

D. Probable Cause to Issue the Arrest Warrant

We now turn to plaintiffs' claim regarding the arrest warrant. Plaintiffs assert that the failure to include all available information regarding D.D.'s credibility and history rendered the search warrant invalid for lack of probable cause. Detective Cox asserts the district court erred in failing to grant her summary judgment based on qualified immunity. On appeal, we must determine whether Ms. Cox was entitled to immunity on this claim.

The affidavit which Ms. Cox submitted to obtain the search warrant contained extensive information based on testimony gained from D.D. Standing alone, the affidavit contained sufficient indicia of probable cause. However, it did not contain the denials from other children regarding the Lindseys' alleged activities nor did it include any information regarding D.D.'s past history or allegations that he abused other children.

In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court held a search warrant can be voided if a defendant makes a substantial showing that the warrant application contains perjurious statements. Id. at 155-56. The warrant is void if, without the statements, the affidavit lacks probable cause. Id. This court recently held the same theory applicable to material omissions. See Stewart v. Donges, 915 F.2d 572, 582-83 (10th Cir. 1990). In this section 1983 action, the question is whether it was clearly established in August 1986 that recklessly omitting material facts from an affidavit violated clearly established fourth and fourteenth amendment rights. We hold it was.

At the time these events occurred, various circuits had already recognized the Franks decision's applicability to material omissions. See United States v. Ippolito, 774 F.2d 1482, 1486-87 n.1 (9th Cir. 1985); Olson v. Tyler, 771 F.2d 277, 281 n.5 (7th Cir. 1985); United States v. Ferguson, 758 F.2d 843, 848 (2d Cir.), cert. denied, 474 U.S. 841 (1985); United States v. Williams, 737 F.2d 594, 604 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985); see also Stewart, 915 F.2d at 582-83 (recognizing clearly established right in this context and

outlining decisions from other circuits holding same). All of these cases were decided prior to the incidents in these appeals. As a result, we hold the law was clearly established.⁸

We agree with the district court that in this case, the omission was material. D.D.'s testimony forms the entire basis for the affidavit. Information indicating other children denied the very same allegations is clearly relevant. Likewise, information questioning his credibility would also be important. This information could well have vitiated probable cause.

Detective Cox testified in her deposition that she verbally informed the judge of D.D.'s credibility problems. Rec. Vol. VI at 55. If she did, there can be no reckless omission. However, there is nothing in the record to corroborate this statement. Because the parties dispute whether the judge was informed, there is a genuine issue of material fact which requires that Ms. Cox stand trial. Stewart, 915 F.2d at 583.

E. The seizure of items from the Lindsey home

The district court determined, as a matter of law, that Ms. Cox is not entitled to immunity for her actions in seizing items from the Lindsey home which were not identified in the search warrant. We address this issue under the same qualified immunity standards set forth in previous sections, and agree with the district court.

⁸ Although this circuit did not have controlling precedent on this issue at the time these events occurred, we may look to the law of other circuits to determine whether a right was clearly established. Morfin v. Albuquerque Pub. Schools, 906 F.2d 1434, 1439 (10th Cir. 1990)

The constitutional right at issue is the ability to remain free from the unreasonable seizure of personal property. See Katz v. United States, 389 U.S. 347, 357 (1967); see also Snell, slip op. at 65 (in child abuse context, reasonable officer would know that using false information to justify search of home violates fourth amendment). In this case we must focus on whether it was objectively reasonable for Ms. Cox to seize items not identified in the search warrant.⁹ We agree with the district court that it was not.

The search warrant described very specific items. With the exception of the undeveloped film and the videotapes, none of the items seized were identified in the warrant. Further, none of the material was illegal or related in any logical or visual way to child pornography or abuse. As the district court noted, there is no evidence linking the seized materials to the sexual abuse charges. Under these circumstances, we agree that the seizure of items not identified in the search warrant was objectively unreasonable.

III.

For the reasons stated, we remand to the district court for further proceedings consistent with this order and judgment. The order of the United States District Court for the Western District

⁹ In Horton v. California, 110 S. Ct. 2301 (1990), the Supreme Court held police officers may validly seize evidence in plain view even though it is not within the purview of a search warrant and the seizure was not inadvertent. Id. at 2308-11. However, there must be probable cause to conduct the initial search, see id. at 2310, and to believe the seized evidence is related to the crime. See id. at 2305 n.1.

of Oklahoma is AFFIRMED. Plaintiffs' motion to strike material from the record is DENIED.

ENTERED FOR THE COURT
PER CURIAM