

10-4081-cv
Flagler v. Trainor

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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7 August Term, 2011
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9 (Argued: September 14, 2011 Decided: November 21, 2011)

10 Docket No. 10-4081-cv
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15 STEPHANIE FLAGLER,
16

17 *Plaintiff-Appellant,*
18

19 -v.-
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21 MATTHEW E. TRAINOR, Assistant District Attorney, Fulton County,
22 New York and THE COUNTY OF FULTON, NEW YORK,
23

24 *Defendants-Appellees.*
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26

27
28 Before:

29 CALABRESI, WESLEY, and LYNCH, *Circuit Judges.*
30

31 Appeal from an order and judgment of the United States
32 District Court for the Northern District of New York
33 (McCurn, J.), which granted Defendants-Appellees' motion to
34 dismiss Plaintiff-Appellant's complaint in its entirety
35 based on absolute prosecutorial immunity.
36

37 Defendants-Appellees moved the district court to
38 dismiss Plaintiff-Appellant's complaint pursuant to Federal
39 Rule of Civil Procedure 12(b)(6), arguing that Defendant-
40 Appellee Matthew Trainor, a Fulton County Assistant District
41 Attorney, was absolutely immune from Plaintiff-Appellant's

1 claims.¹ We conclude that the district court correctly
 2 found Trainor absolutely immune from liability for making
 3 alleged false statements in support of a material witness
 4 order and warrant.

5
 6 We also conclude, however, that the district court
 7 erred by finding Trainor absolutely immune from Plaintiff-
 8 Appellant's other claims. Because absolute immunity only
 9 extends to conduct related to prosecutorial functions that
 10 are intimately associated with initiating or presenting the
 11 State's case, it does not immunize prosecutors from
 12 liability for: (1) making defamatory statements to the
 13 press; (2) accessing a person's voicemail without consent;
 14 or (3) persuading a party to a conversation to record its
 15 contents. We also vacate and remand for the district court
 16 to consider in the first instance whether immunity extends
 17 to Trainor's decision to "preserve" evidence after the
 18 criminal prosecution has run its course.

19
 20 We express no view as to the substantive viability of
 21 these claims. We simply conclude that absolute immunity
 22 does not shield this conduct.

23
 24 **AFFIRMED** in part, **VACATED** and **REMANDED** in part.

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 28 BRADFORD BENSON, The Golden Law Firm, Utica, NY, *for*
 29 *Plaintiff-Appellant.*

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 31 THOMAS HIGGS, Murphy, Burns, Barber & Murphy, LLP,
 32 Albany, NY, *for Defendants-Appellees.*

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 36 WESLEY, *Circuit Judge:*

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 38 This case requires us to revisit the purpose and scope
 39 of absolute immunity for prosecutors.

¹ Flagler sued Fulton County, but has abandoned those claims. See *Flagler v. Trainor*, No. 08-cv-138, 2010 WL 3724015, at *3 (N.D.N.Y. Sept. 15, 2010). In addition, Flagler has clarified that she only sued Trainor in his individual capacity; she does not sue him in his official capacity.

1 I.

2 Plaintiff-Appellant Stephanie Flagler was a victim of
3 domestic violence at the hands of her ex-boyfriend, Brandon
4 Becker. A grand jury indicted Becker for a criminal matter
5 in which Flagler was the complaining witness. Becker's
6 trial was scheduled to begin on March 12, 2007. In the days
7 leading up to Becker's trial, Assistant District Attorney
8 Matthew Trainor grew concerned that Becker was encouraging
9 Flagler to leave the state in order to avoid testifying at
10 his trial. In addition, Trainor spoke with Becker's ex-
11 wife, who claimed that Flagler had told her that she planned
12 to leave the state from March 5, 2007 to March 12, 2007 and
13 would not talk to anyone in the District Attorney's office.

14 A. Material Witness Order and Arrest Warrant.

15 Trainor sought a material witness order to secure
16 Flagler's attendance at Becker's trial pursuant to New York
17 Criminal Procedure Law Article 620. He alleged that Flagler
18 had quit responding to telephone calls after January 5,
19 2007, and that she was "avoiding service of subpoena [sic]
20 for the upcoming trial." He also recounted for the court
21 his conversation with Becker's ex-wife. Trainor moved for
22 the material witness order on March 1, 2007. On the basis

1 of Trainor's affirmation, the County Court ordered Flagler
2 to appear at a hearing on March 7, 2007 in order to
3 determine whether she "should be adjudged a material
4 witness." The court also issued a material witness arrest
5 warrant. In doing so, the judge found "reasonable cause" to
6 believe that Flagler "would be unlikely to respond" to the
7 court's order voluntarily.

8 In her complaint, Flagler alleged that Trainor
9 knowingly made false statements in support of the material
10 witness order. She claimed that while she had planned to
11 leave for a vacation on March 8, 2007, Trainor knew that she
12 would return on March 11, 2007, in time for Becker's trial.
13 She asserted that despite knowing her home, work, and school
14 addresses, Trainor made no attempt to notify her about
15 Becker's upcoming trial or to subpoena her. In addition,
16 Flagler alleged that while the County Court issued the
17 material witness arrest warrant on March 1, 2007, she was
18 not arrested until March 7, 2007, one day *after* she called
19 Trainor and confirmed that she would testify.

20 **B. Flagler's Arrest, the Material Witness Hearing, and the**
21 **Confiscation of Flagler's Cell Phone.**

22 Pursuant to the material witness arrest warrant, the
23 Utica Police Department arrested Flagler at her home and

1 transported her to the Fulton County Supreme Court for the
2 March 7, 2007 hearing. Justice Richard T. Aulisi appointed
3 a Fulton County Public Defender to represent Flagler at the
4 material witness hearing. At the hearing, Flagler told
5 Justice Aulisi that she had been cooperative with the
6 District Attorney's office and had never said she would not
7 come to court. Trainor never told Justice Aulisi about
8 Flagler's phone call from the prior day, and despite her
9 communications, Trainor recommended that the court remand
10 her into custody. After the hearing, the Fulton County
11 Sheriff's Department took Flagler back into custody and held
12 her overnight without bail. She appeared before the County
13 Court the following morning, and was released on bail.

14 The Sheriff's Department confiscated Flagler's cell
15 phone when the Department took custody of Flagler. Flagler
16 alleged that the Sheriff's Department gave her cell phone to
17 Trainor and that someone in the District Attorney's office
18 unlawfully tried to access Flagler's voicemail. Flagler
19 also alleged that Trainor has refused to return her cell
20 phone, even though Becker's conviction is final.

21 **C. Trainor's Other Alleged Wrongful Acts.**

22 Flagler also alleged that Trainor made a defamatory

1 statement against her by falsely proclaiming to the press
2 that she had been "hiding out," and that Trainor persuaded
3 Becker's ex-wife to record telephone calls with Flagler
4 without her consent.

5 **D. Procedural History.**

6 Trainor moved to dismiss Flagler's complaint *solely* on
7 the basis of absolute prosecutorial immunity. Mot. to
8 Dismiss 1-5, *Flagler v. Trainor*, No. 08-cv-138 (N.D.N.Y.
9 Jan. 14, 2009), ECF No. 10-7. The District Court granted
10 the motion, dismissing all of Flagler's federal claims and
11 declining to consider Flagler's remaining state claims
12 without a federal counterpart. *Flagler*, 2010 WL 3724015, at
13 *4-6. Flagler filed a timely notice of appeal, and we now
14 affirm in part and vacate and remand in part.

15 **II.**

16 **A. Absolute Prosecutorial Immunity.²**

17 Prosecutors are generally immune from liability under
18 42 U.S.C. § 1983 for conduct in furtherance of prosecutorial

² In this case, the standard of review is well known and not at issue. "We review *de novo* a district court's grant of a motion to dismiss pursuant to Rule 12(b)(6), accepting all factual allegations in the complaint as true and drawing all inferences in the plaintiff's favor." *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 685 (2d Cir. 2001). We will "affirm only if it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Id.* (internal quotation marks omitted) (alterations in original).

1 functions that are intimately associated with initiating or
2 presenting the State's case. *Imbler v. Pachtman*, 424 U.S.
3 409, 427-28 (1976). Section 1983 immunity is grounded in
4 the prosecutor's common law tort immunity. That immunity
5 arises from the "concern that harassment by unfounded
6 litigation would cause a deflection of the prosecutor's
7 energies from his public duties, and the possibility that he
8 would shade his decisions instead of exercising the
9 independence of judgment required by his public trust." *Id.*
10 at 423. "[I]f the prosecutor could be made to answer in
11 court each time [an aggrieved defendant] charged him with
12 wrongdoing, his energy and attention would be diverted from
13 the pressing duty of enforcing the criminal law." *Id.* at
14 425. Immunity protects the proper functioning of the
15 prosecutor's office by insulating the exercise of
16 prosecutorial discretion. *Kalina v. Fletcher*, 522 U.S. 118,
17 125 (1997).

18 Yet absolute prosecutorial immunity is not without its
19 costs. In *Imbler*, the Supreme Court explained:

20 To be sure, this immunity does leave the genuinely
21 wronged defendant without civil redress against a
22 prosecutor whose malicious or dishonest action
23 deprives him of liberty. But the alternative of
24 qualifying a prosecutor's immunity would disserve
25 the broader public interest. It would prevent the

1 vigorous and fearless performance of the
2 prosecutor's duty that is essential to the proper
3 functioning of the criminal justice system.

4 424 U.S. at 427-28; see also *Gregoire v. Biddle*, 177 F.2d
5 579, 581 (2d Cir. 1949). Thus, while absolute prosecutorial
6 immunity may leave an injured party without a remedy,
7 society has found more benefit in insulating the exercise of
8 prosecutorial discretion.

9 That being said, the Supreme Court has clarified that
10 immunity is not a function of the prosecutor's *title*.
11 *Kalina*, 522 U.S. at 125, 127. Rather, it attaches to
12 prosecutorial functions that are intimately associated with
13 initiating or presenting the State's case. *Id.* Prosecutors
14 are absolutely immune from suit only when acting as
15 advocates and when their conduct involves the exercise of
16 discretion. *Id.* at 127. Thus, the Supreme Court has found
17 prosecutors absolutely immune from suit for alleged
18 misconduct during a probable cause hearing,³ in initiating a
19 prosecution,⁴ and in presenting the State's case.⁵ On the
20 other hand, the Court has withheld absolute immunity for

³ *Burns v. Reed*, 500 U.S. 478, 492 (1991).

⁴ *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976).

⁵ *Id.*

1 conduct unrelated to advocacy, such as giving legal advice,⁶
2 holding a press conference,⁷ or acting as a complaining
3 witness.⁸

4 The task then is to determine whether each asserted
5 wrongful act falls within the zone of Trainor's absolute
6 immunity as a prosecutor.

7 **1. False Statements Made in Support of a Material**
8 **Witness Order.**

9 Flagler contends that by making sworn factual
10 statements in support of the order, Trainor was acting as a
11 complaining witness rather than as an advocate. In *Kalina*
12 *v. Fletcher*, the Supreme Court held that a prosecutor was
13 not absolutely immune from liability for making false
14 statements in support of an arrest warrant. There, the
15 prosecutor provided a "Certification for Determination of
16 Probable Cause" that summarized the evidence supporting the
17 arrest warrant. 522 U.S. at 121. Rather than attaching to
18 the motion an affidavit from a witness with personal
19 knowledge of facts, the prosecutor "personally vouched for
20 the truth of the facts set forth in the certification." *Id.*

⁶ *Burns*, 500 U.S. at 492-96.

⁷ *Buckley v. Fitzsimmons*, 509 U.S. 259, 276-78 (1993).

⁸ *Kalina v. Fletcher*, 522 U.S. 118, 129-31 (1997).

1 The certification included two inaccurate factual
2 statements, *id.*; the charges against the defendant were
3 eventually dismissed, *id.* at 122. The former defendant sued
4 the prosecutor under Section 1983 “based on [the
5 prosecutor’s] alleged violation of his constitutional right
6 to be free from unreasonable seizures.” *Id.* The prosecutor
7 moved for summary judgment based on absolute prosecutorial
8 immunity. The district court denied immunity and both the
9 Ninth Circuit and Supreme Court affirmed. *Id.* at 122-23.

10 After surveying the history of prosecutorial immunity,
11 the Supreme Court recognized immunity’s two important
12 functions: (1) “protecting the prosecutor from harassing
13 litigation that would divert [the prosecutor’s] time and
14 attention from his official duties”; and (2) “the interest
15 in enabling [the prosecutor] to exercise independent
16 judgment when deciding which suits to bring and in
17 conducting them in court.” *Id.* at 125 (internal quotation
18 omitted). The Court recognized that the second
19 function—insulating the prosecutor’s discretion when acting
20 as advocate—was of “primary importance.” *Id.* But sworn
21 statements in support of an arrest warrant were not

1 intimately associated with a prosecutor's duty to advocate.⁹
2 Rather, offering sworn statements was an "act that any
3 competent witness might have performed." *Id.* at 129-30.
4 The prosecutor was acting as a complaining witness, not as
5 an advocate; "[t]estifying about facts is the function of
6 the witness, not of the lawyer." *Id.* at 130. The Court
7 also noted that "neither federal nor state law made it
8 necessary for the prosecutor to make [the factual
9 assertion]." *Id.* at 129.

10 *Kalina* is easily distinguishable from the case before
11 us. There are key differences between arrest warrants and
12 material witness orders. For one, in New York, only a
13 prosecutor or defense attorney can seek a material witness
14 order. N.Y. Crim. Proc. Law § 620.20(1); *see also* N.Y.
15 Crim. Proc. Law § 620.30(1) (requiring the "applicant" to
16 make a written, sworn application in order to commence
17 material witness proceedings; the applicant is either the
18 prosecutor or defense attorney). Further, an arrest warrant
19 is one of the first steps required to begin a criminal

⁹ The Court held that preparing and drafting of the certification was protected by absolute immunity because it was intimately associated with a prosecutors's advocacy. It was only the act of "personally attesting to the truth of the averments" that went beyond the prosecutor's duty to advocate. *Kalina*, 522 U.S. at 129.

1 investigation. A material witness order, in contrast, may
2 issue only when a prosecution is ready for trial.

3 Seeking a material witness order is within the
4 prosecutor's "function" as an advocate. A prosecutor
5 employs prosecutorial discretion when determining whether to
6 seek such an order. See *Betts v. Richard*, 726 F.2d 79, 79
7 (2d Cir. 1984)¹⁰; *Daniels v. Kieser*, 586 F.2d 64, 69 (7th
8 Cir. 1978). It is an act "intimately associated" with
9 presenting the State's case. The material witness order
10 ensures the attendance of a "material" witness at trial,
11 which often makes or breaks the prosecutor's case.

12 Nevertheless, Flagler argues that the Third and Ninth
13 Circuits have denied absolute prosecutorial immunity for

¹⁰ In *Betts v. Richard*, 726 F.2d 79 (2d Cir. 1983), we held that a prosecutor who had obtained a writ of capias (essentially the Connecticut equivalent of a material witness warrant) to ensure the presence of the complaining witness at a criminal trial was immune from liability under § 1983. It is arguable that *Betts* is controlling authority in this circuit, subject only to whether *Kalina* abrogates its precedential force. Because we believe that absolute immunity applies even on the analysis set forth in *Kalina*, and would reach the same result even if *Betts* had never been decided, we do not need to decide whether *Kalina* sets forth a sufficiently novel analysis to require us to rethink the *Betts* precedent. See *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir. 2003) (setting forth the standard for when we may disregard circuit authority in light of intervening Supreme Court precedent). It follows from our analysis that while the *Betts* court did not have the benefit of *Kalina*, and applied a somewhat different framework derived from earlier cases, its result would survive any rethinking that *Kalina* might require.

wrongdoing in connection with prosecutorial functions.
Flagler, however, fails to recognize that the wrongdoing in those cases was either administrative in nature¹¹ or akin to the function of law enforcement officers in protecting the public safety by making a complaint of wrongdoing.¹²
Therefore, notwithstanding Flagler's arguments to the contrary, we find Trainor absolutely immune for making alleged false statements in support of a material witness order and warrant.

2. Alleged Defamatory Statements Made to the Press.

Flagler argues that Trainor defamed her by falsely

¹¹ *Odd v. Malone*, 538 F.3d 202, 213, 215-16 (3d Cir. 2008). In *Odd*, the Third Circuit held that keeping the court informed about the status of a criminal proceeding (which could affect a material witness's continued detention) was an administrative task. The court recognized, however, that *securing* a material witness's attendance at trial was shielded by absolute immunity. *Id.* at 212. That is the case before us; Flagler challenges Trainor's conduct that was intimately associated with his securing her attendance at trial as a material witness.

¹² In *Cruz v. Kauai County*, the Ninth Circuit denied absolute immunity because the prosecutor's conduct—swearing to facts in support of a bail revocation—was akin to conduct of a complaining witness, even though Hawaii law restricted authority to seek bail revocation to a prosecutor. 279 F.3d 1064, 1067-68 (9th Cir. 2002). We recognize that our holding may be in tension with *Cruz*. In *Cruz*, however, the district court granted only *qualified* immunity, so the Ninth Circuit's discussion about *absolute* immunity is largely dicta. And, we believe that in seeking a material witness warrant, despite signing an affidavit, the prosecutor is intimately involved in advocacy—assembling and presenting the State's case.

1 stating to the press that she had been "hiding out" before
2 the trial. Trainor *only* claimed absolute immunity from
3 liability for this claim; he did not challenge the substance
4 of the pleading.

5 In *Buckley v. Fitzsimmons*, the Supreme Court held that
6 "statements to the media are not entitled to absolute
7 immunity." 509 U.S. 259, 277 (1993). The Court explained
8 that while absolute immunity shields statements made during
9 a judicial proceeding, it does not shield statements made
10 outside court. *Id.* The Court reasoned: "The conduct of a
11 press conference does not involve the initiation of a
12 prosecution, the presentation of the State's case in court,
13 or actions preparatory for these functions." *Id.* at 278.
14 The Court recognized that while statements to the press may
15 be an "integral part" of the prosecutor's job, the duty is
16 no different than that for other executives who deal with
17 the press and enjoy only *qualified* immunity. *Id.* Because
18 absolute immunity does not shield statements made to the
19 press, the district court erred by dismissing Flagler's
20 defamation claim on account of absolute immunity.

1 **3. Alleged Accessing of a Person's Voicemail without**
2 **Consent and Persuading Becker's Ex-Wife to Record**
3 **Telephone Calls.**

4 We have no trouble concluding that Trainor is not
5 absolutely immune from allegedly accessing, or ordering
6 someone to access, Flagler's voicemail without her consent,
7 or from persuading Becker's ex-wife to record telephone
8 calls with Flagler.¹³ The alleged misconduct is akin to
9 investigatory acts, and absolute immunity does not shield
10 investigatory acts. See, e.g., *Van de Kamp v. Goldstein*,
11 555 U.S. 335, 342 (2009); *Imbler*, 424 U.S. at 430; *Pierson*
12 *v. Ray*, 386 U.S. 547, 557 (1967). As a result, the district
13 court erred by dismissing Flagler's claims on this ground.

14 **4. Alleged Withholding/Preserving of Evidence After a**
15 **Criminal Prosecution Has Run its Course.**

16 Trainor argues that by withholding Flagler's cell
17 phone, he is preserving evidence and that preservation of
18 evidence is intimately associated with presenting the
19 State's case. In *Parkinson v. Cozzolino*, we held that a
20 prosecutor is absolutely immune for withholding/preserving

¹³ We take no position on whether these acts occurred or whether they would constitute actionable misconduct if they did. In general, so long as one party to a conversation consents to its recording, the recording is lawful under both New York and federal law. See N.Y. Crim. Proc. Law § 700.05; N.Y. Penal Law § 250.00; *United States v. White*, 401 U.S. 745 (1971).

1 evidence to be used in connection with a criminal
2 prosecution, and that immunity extends throughout a
3 subsequent appeal. 238 F.3d 145, 152 (2d Cir. 2001). We
4 made no determination, however, "as to when such immunity
5 ends." *Id.*

6 We recognize the inherent conflict between Flagler's
7 argument and a prosecutor's duty to defend a conviction. If
8 we agreed with Flagler, absolute immunity would end once the
9 time to appeal and collaterally attack a conviction had run.
10 But some collateral attacks, like actual innocence, have no
11 statute of limitations. And as technology advances, we
12 learn of new tests and tools that make fact finding more
13 precise - technologies once thought inconceivable.
14 Therefore, without fuller development of the issue by
15 thoughtful briefing and factual development in the district
16 court, we are unwilling to draw a line as to how long
17 absolute immunity shields a prosecutor for
18 withholding/preserving evidence.

19 Rather, we recognize that Trainor did not raise
20 *Cozzolino* below. We therefore vacate and remand the
21 district court's order and judgment so it may consider
22 whether Trainor is absolutely immune for preserving

1 evidence—Flagler’s cell phone—after Becker’s conviction
2 became final. Of course, the district court need not
3 address this issue if it deems summary judgment appropriate
4 on the basis of qualified immunity.

5 **III.**

6 We **AFFIRM** the district court to the extent it found
7 Trainor absolutely immune from Flagler’s claim that he
8 violated her constitutional rights by making false
9 statements in support of a material witness order. We
10 **VACATE** and **REMAND** the rest of the order and judgment because
11 absolute immunity does not immunize prosecutors from
12 liability for making defamatory statements to the press,
13 accessing a person’s voicemail without consent, or
14 persuading a party to a conversation to record its contents;
15 and, the district court should consider in the first
16 instance whether Trainor is absolutely immune for continuing
17 to withhold/preserve evidence—Flagler’s cell phone.