NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-4010

GARY PHILLIP EVANS

v.

YORK COUNTY ADULT PROBATION AND PAROLE DEPARTMENT;
DONALD R. LAUER, JR.

Gary P. Evans,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 1-09-cv-01013)
District Judge: Hon. Christopher C. Conner

Submitted under Third Circuit LAR 34.1(a)
September 9, 2013

Before: SMITH, ALDISERT and SLOVITER, Circuit Judges.

(Filed: September 11, 2013)

OPINION OF THE COURT

ALDISERT, Circuit Judge.

Plaintiff Gary Evans appeals from a final judgment of the United States District

Court for the Middle District of Pennsylvania, arguing that the Court erred when it concluded that probation officer Donald Lauer, Jr. was cloaked in qualified immunity to the extent that he complied with the policy of the York County Adult Probation and Parole Department ("Department"). Evans also argues that the Court erred when it entered judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure in favor of Lauer as to several of Evans's 42 U.S.C. § 1983 claims against Lauer. We will affirm the judgment of the District Court.

I.

Because we write primarily for the parties, who are familiar with the facts and the proceedings in this case, we will revisit them only briefly.

A.

In December 2006, Evans was convicted in state court of two counts of indecent assault and corruption of minors and unlawful contact with minors. After serving a term of incarceration, he was paroled and placed under the supervision of the Department, with Lauer assigned as his probation officer. While still under the Department's supervision, the state court reinstated Evans's right to appeal *nunc pro tunc*. Soon after, on March 13, 2009, Evans was released on bail pending his appeal.

B.

On May 28, 2009, Evans filed a complaint in the District Court under § 1983, alleging that the Department and Lauer violated his constitutional rights by maintaining certain restraints on his freedom after he was released on bail and no longer on parole or probation. Among these restraints were restrictions on travel, contact with minors, and religious service attendance. Neither Lauer nor the Department disputed that Lauer continued to enforce the conditions of Evans's parole from March 13, 2009—the date

Evans was released on bail pending his appeal—until April 7, 2009—the date the Department and Lauer claimed they received notice that Evans's appeal had been filed.

C.

On December 10, 2010, the District Court granted summary judgment in favor of the Department on the basis of Eleventh Amendment immunity. It also denied Evans's motion for partial summary judgment as to several of his § 1983 claims against Lauer, concluding that Lauer's actions were "cloaked in qualified immunity" to the extent that he complied with the Department's policy requiring him to "continue supervising Evans until the Department received notice that Evans filed an appeal *nunc pro tunc*." App. 49. The District Court noted, however, that there was a genuine dispute of material fact as to when Lauer and the Department received notice that Evans's appeal had been filed. Accordingly, a trial date was set.

At the close of evidence the Court entered judgment as a matter of law in favor of Lauer as to some, but not all, of Evans's claims. The District Court concluded there was insufficient evidence to support Evans's First Amendment compelled speech claim; his Fifth Amendment self-incrimination claim; and his Sixth Amendment right to counsel claim. App. 1118. Evans's remaining claims were submitted to the jury along with the disputed issue of whether Lauer continued to supervise Evans after receiving notice of Evans's appeal. App. 1874-1881.

At the conclusion of the trial, the jury found that "Lauer did not [continue to] supervise Evans after he had discovered that Evans filed his appeal." App. 58-59. Accordingly, the District Court entered judgment in favor of Lauer and against Evans. The Court also denied Evans's post-trial motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure or, alternatively, for a new trial under

Rule 59(a). Evans appeals.[1]

II.

A.

We find no merit in Evans's argument that the District Court erred when, at the close of evidence, it entered judgment as a matter of law in favor of Lauer on Evans's First Amendment compelled speech claim; his Fifth Amendment self-incrimination claim; and his Sixth Amendment right to counsel claim. See Brief of Appellant 19. Viewing the facts in the light most favorable to Evans, and giving him the advantage of every reasonable inference, see Eshelman v. Agere Sys., Inc., 554 F.3d 426, 433 (3d Cir. 2009), we agree with the District Court that there was insufficient evidence to support these claims.[2]

B.

We also reject Evans's argument that the District Court erred by concluding that

[1] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the District Court's denial of Evans's motion for partial summary judgment on the basis of Lauer's potential qualified immunity, Kopec v. Tate, 361 F.3d 772, 775 (3d Cir. 2004), and over the District Court's entry of judgment as a matter of law on several claims pursuant to Rule 50 of the Federal Rules of Civil Procedure, Eshelman v. Agere Sys., Inc., 554 F.3d 426, 433 (3d Cir. 2009).

[2] We agree with the District Court that "the record evidence shows[] Mr. Evans did not admit [guilt] to Mr. Lauer" and accordingly Evans "cannot sustain a claim for violation of his First Amendment right." App. 1819. We agree also that "Mr. Evans did not make any statement incriminating himself . . . that can be used against [him] in a future criminal case. Therefore [he] cannot sustain his Fifth Amendment self-incrimination claim." Id. at 1820. Lastly, we agree with the District Court that Evans "has not set forth any evidence that Mr. Lauer prevented Mr. Evans from seeing or communicating with his counsel, . . . elicited any statements from Mr. Evans regarding his criminal case in the absence of counsel or obtained any substantive information about Mr. Evans's discussions with his counsel." Id.

Lauer was entitled to qualified immunity to the extent that he followed Department policy. In determining whether a public official is entitled to qualified immunity, two distinct inquiries arise. First, "a court must decide whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right." Pearson v. Callahan, 555 U.S. 223, 232 (2009). Second, "the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." Id. A court is not required, however, to address these two inquiries sequentially. Id. at 236. It may eschew difficult constitutional issues and grant qualified immunity if it is apparent that the rights at issue were not "clearly established" at the time the official acted. Id. Accordingly, this Court will begin its analysis with this second inquiry.

1.

The question that must be answered under the second inquiry is "whether a reasonable public official would know that his or her specific conduct violated clearly established rights." Gruenke v. Seip, 225 F.3d 290, 299 (3d Cir. 2000) (quoting Grant v. City of Pittsburgh, 98 F.3d 116, 121 (3d Cir. 1996)). This standard is intended to give officials "ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." Marcavage v. Nat'l Park Serv., 666 F.3d 856, 860 (3d Cir. 2012), cert. denied, 133 S. Ct. 525 (Oct. 29, 2012) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)).

Here, we conclude that the District Court correctly determined that Lauer's actions were "cloaked in qualified immunity to the extent that he complied with the Department's policy." See App. 49. Lauer had been supervising Evans for over a year prior to Evans's release on bail. During that time, Lauer was responsible for ensuring Evans's compliance with various Department parole conditions, including a prohibition

on travel outside York County, a prohibition on unsupervised contact with minors, and a prohibition on attending more than one church service per week. Id. at 17-20. When Evans was released on bail pending his appeal *nunc pro tunc*, Lauer acted in accordance with the Department's policy. It is undisputed that the Department's policy indicated that Lauer's supervision of Evans should continue until the Department *received notice* that Evans's appeal had been filed. Id. at 48. That policy had been in place for over five years and was intended "to assure that those defendants released on bail pending appeal actually filed the appeal and did not obtain release pending appeal and then procrastinate in doing so." Id.

Importantly, we take no position on the propriety of the Department's policy. See Pearson, 555 U.S. at 236 (noting that a court may "bypass" the first inquiry of a qualified immunity analysis). The legality of the Department's policy is of no consequence to this Court's decision that Lauer is entitled to qualified immunity insofar as he followed it *and it was reasonable for him to do so in the absence of clearly established law to the contrary*. See Wilson v. Layne, 526 U.S. 603, 614-618 (1999) (concluding that the conduct of several U.S. Marshals violated plaintiffs' Fourth Amendment rights, but that they were still entitled to qualified immunity, in part because the law governing their conduct was not well developed and because they relied on a policy which explicitly contemplated the challenged conduct).

Here, Evans argues that his "right[s] to speech, religion, not incriminate himself, legal counsel, family, and travel" *are* clearly established. Brief of Appellant 19. Evans, however, does not delineate the violations of these rights with the appropriate level of specificity for the purpose of analyzing a qualified immunity defense. See Wilson, 526 U.S. at 615. Although Evans can argue that his First, Fifth, Sixth and Fourteenth

Amendment rights are, in the abstract, "clearly established," the precise "contours" of these rights are not clear in the circumstances here, such that the alleged unlawfulness of the conduct required by the Department would be apparent to Lauer. See id. (acknowledging that "[i]t could plausibly be asserted that *any* violation of the Fourth Amendment is 'clearly established,' since it is clearly established that the protections of the Fourth Amendment apply to the actions of police," but that under the doctrine of qualified immunity a "right allegedly violated *must* be defined at the appropriate level of specificity before a court can determine if it was clearly established") (emphasis added).[3]

2.

In sum, even viewing the evidence in the light most favorable to Evans, we cannot conclude that a reasonable person in Lauer's position should have known that the Constitution required him to deviate from Department policy. We will affirm.

* * * * *

We have considered all of the arguments advanced by the parties and conclude that no further discussion is needed. The judgment of the District Court will be AFFIRMED.

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[3] It is worth noting that some of the conditions of parole Lauer continued to enforce while Evans was on bail were also conditions set forth in the state court's bail order. See App. 1822-1823 (counsel stating that there were two restrictions "simultaneously" affecting Evans's ability to reside with his family after he was released on bail: the state court's restriction and Lauer's allegedly unlawful one). This helps bring into focus the issue here, which is not whether Evans *has* First, Fifth, Sixth and Fourteenth Amendment rights, but whether the precise contours of those rights, under all the circumstances, were clearly established such that Lauer would know he was violating them by continuing to supervise Evans for the limited period of time between his release on bail and receipt of notice of his appeal, all in accordance with Department policy.