

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7044

September Term, 2019

FILED ON: APRIL 28, 2020

RUTH E. RICHARDS,

APPELLANT

v.

JENNIFER GELSOMINO, METROPOLITAN POLICE DEPARTMENT OFFICER,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-01002)

Before: HENDERSON and RAO, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia, briefed and argued by counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the judgment of the District Court be **AFFIRMED**.

Ruth Richards (Richards) was involved in an altercation with her ex-husband, George Richards (George), and his new girlfriend, Sharneisha Grady (Grady). Metropolitan Police Department (MPD) Officer Jennifer Gelsomino (Gelsomino) was dispatched to the scene and, after investigating, arrested Richards for “threats to do bodily harm” in violation of D.C. Code § 22-407. Richards believes her arrest was unconstitutional, alleging Gelsomino violated the Fourth Amendment by arresting her without probable cause and, in addition, violated the Fifth Amendment by arresting her based on her national origin. Richards sued in district court under 42 U.S.C. § 1983 and the district court granted summary judgment to Gelsomino.

We present the facts in the light most favorable to Richards, the party opposing summary judgment. *See Johnson v. Perez*, 823 F.3d 701, 703 n.1 (D.C. Cir. 2016). Grady lived in a rowhouse next to Eva Woods, George’s mother (Richards’ former mother-in-law). On May 29, 2013, as

Richards walked near the houses, Grady, her son and George arrived in George's car. After the threesome exited George's car, Richards and her ex-husband engaged in a verbal altercation that turned physical when George struck Richards in the face. Richards shouted at George and Grady during the exchange and continued to do so after they and Grady's son went inside Grady's house, prompting Grady to call 911.

Gelsomino and her partner, Officer Nelson Alas (Alas), were dispatched and notified that a suspect at the scene (Richards) had threatened bodily harm against Grady and George. When the two officers arrived, Richards was on the front porch of Woods' house and George, Grady and Grady's son remained inside Grady's house. Initially, Gelsomino and Alas split up, with Alas interviewing Richards while Gelsomino went inside Grady's house. There, Grady told Gelsomino that Richards "got into [her] face" and threatened to "smack" her, a statement George corroborated. J.A. 65–66. Unsurprisingly, neither mentioned George having struck Richards. With these interviews complete, Gelsomino went back outside and asked Richards to come down from Woods' front porch and, after Richards complied, asked her: "Where were you born?"¹ Richards answered that she was born in Jamaica and, with no further investigation, Gelsomino handcuffed Richards and placed her under arrest.

After Gelsomino placed Richards in her patrol car, a neighbor, Katherlean Johnson (Johnson), approached the officers and reported witnessing George strike Richards. In response, Alas arrested George inside Grady's house. Johnson also told the officers that, although she saw Richards argue with George, she did not see Richards argue with Grady. Both Richards and George were then taken to the police station—Richards in Gelsomino's cruiser and George in Alas'. Richards was held overnight and released the following day. She never appeared before a judge and was not prosecuted.²

On May 27, 2016, Richards filed a complaint against Gelsomino in district court under 42 U.S.C. § 1983. She alleged Gelsomino violated the Fourth Amendment by arresting her without probable cause and the Fifth Amendment by arresting her based on her national origin. Following discovery, the district court granted summary judgment to Gelsomino, *Richards v. Gelsomino*, No. 16-1002, 2019 WL 1535466, at *2 (D.D.C. Apr. 8, 2019), and Richards timely appealed. We have jurisdiction under 28 U.S.C. § 1291 and review the district court's summary judgment de novo. *See Harris v. Gonzalez*, 488 F.3d 442, 444 (D.C. Cir. 2007).

We begin with Richards' Fourth Amendment claim. The Fourth Amendment protects "the right of the people . . . against unreasonable searches and seizures." U.S. CONST. amend. IV. A

¹ It is undisputed that this is the only question Gelsomino asked Richards before her arrest, although it is unclear how many times she asked it. *See Richards v. Gelsomino*, No. 16-1002, 2019 WL 1535466, at *2 (D.D.C. Apr. 8, 2019).

² In June 2013, Richards filed a complaint with the MPD's Office of Police Complaints. In it, she stated that "the only question that Gelsomino; the arresting officer asked me multiple times was regarding my citizenship status." J.A. 204. Following an internal investigation, MPD issued Gelsomino a Letter of Prejudice on March 25, 2016, for violating a general order that prohibits MPD officers from "question[ing] persons about residency or immigration status" unless the investigation involves a crime to which the information is relevant. *Id.* at 317.

warrantless arrest—i.e., a “seizure”—is reasonable if “there is probable cause to believe that a criminal offense has been or is being committed.” *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). We assess probable cause “from the perspective ‘of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.’” *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014) (citation omitted).

Gelsomino arrested Richards for threatening bodily harm in violation of D.C. Code § 22-407. “[I]n order to obtain a conviction [under § 22-407], the government must prove . . . that the defendant (1) ‘uttered words to another person’ (2) with a result that ‘the ordinary hearer would reasonably believe that the threatened harm would take place.’” *Carrell v. United States*, 165 A.3d 314, 319–20 (D.C. 2017) (alterations and footnote omitted) (quoting *In re S.W.*, 45 A.3d 151, 155 (D.C. 2012)). The defendant must also intend that her words be threatening. *See id.* at 320 (citing *Elonis v. United States*, 135 S. Ct. 2001, 2011–12 (2015)).

We believe no reasonable jury could find that Gelsomino lacked probable cause to arrest Richards for violating § 22-407 and therefore affirm the district court’s grant of summary judgment to Gelsomino on Richards’ Fourth Amendment allegation. “Probable cause to make an arrest requires a showing that the police had ‘enough information to “warrant a man of reasonable caution in the belief” that a crime has been committed and that the person arrested has committed it.’” *Barham v. Ramsey*, 434 F.3d 565, 572 (D.C. Cir. 2006) (quoting *United States v. Short*, 570 F.2d 1051, 1053 (D.C. Cir. 1978)). “[P]robable cause ‘deals with probabilities and depends on the totality of the circumstances.’” *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). “[I]t is ‘a fluid concept’ that is ‘not readily, or even usefully, reduced to a neat set of legal rules.’” *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). It “is not a high bar” and “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *Id.* (citations omitted).

Richards argues that Gelsomino failed to conduct a reasonably thorough investigation before arresting her and “ignored plainly relevant and available evidence.” Appellant’s Br. 23. Specifically, that Gelsomino 1) “never asked [her] any questions about the incident before” arresting her; 2) never re-questioned Grady after learning that George “violently attacked” her; and 3) failed to interview possible eyewitnesses. *Id.*

Gelsomino’s interviews of George and Grady, combined with the 911 reports, provided probable cause to believe Richards had violated § 22-407. As the district court held, “Gelsomino need not have heard the threat herself. It is sufficient that she ‘received information from some person—normally the putative victim or an eyewitness—who it seems reasonable to believe is telling the truth.’” *Richards*, 2019 WL 1535466, at *5 (alteration and footnote omitted) (quoting *Daniels v. United States*, 393 F.2d 359, 361 (D.C. Cir. 1968) (per curiam)). Indeed, Gelsomino had information from both the putative victim (Grady) and an eyewitness (George). “Once a police officer has a reasonable basis for believing there is probable cause, [she] is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest.” *Amobi v. D.C. Dep’t of Corr.*, 755 F.3d 980, 990 (D.C. Cir. 2014) (citation omitted).

Richards' other arguments are similarly unpersuasive. That Gelsomino did not re-question Richards after learning of George's attack is irrelevant to whether Richards threatened *Grady* and, if anything, bolsters probable cause by providing a motive to threaten George's new girlfriend. Further, any potential witness Gelsomino declined to interview may have been, like Johnson, too far away to have heard Richards threaten Grady even if he saw George assault Richards. There is no indication that Gelsomino chose to ignore plainly exculpatory evidence that should have affected her judgment.

Richards' Fifth Amendment claim fares no better. The Fourteenth Amendment's equal protection guarantee applies to law enforcement officers in the District of Columbia via the Fifth Amendment, *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and "prohibits selective enforcement of the law" based on national origin, *Whren v. United States*, 517 U.S. 806, 813 (1996). To establish her Fifth Amendment claim, Richards must satisfy "ordinary equal protection standards." *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (citation omitted). That is, she must show that Gelsomino's actions "had a discriminatory effect and . . . [were] motivated by a discriminatory purpose." *Id.* (citation omitted); *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–67 (1977).

If a plaintiff relies entirely on circumstantial evidence—as most do—a required "threshold showing" is that she was treated differently from "similarly situated suspects of other races." *Armstrong*, 517 U.S. at 458. Here, Richards concededly has offered no evidence that Gelsomino treated her differently from a similarly situated suspect born outside the United States. *See* Appellant's Br. 17–18. Instead, Richards' Fifth Amendment claim is based entirely on her theory that the question "where were you born?" is *direct* evidence of discrimination. The district court rejected this theory. *Richards*, 2019 WL 1535466, at *9. We agree.

Drawing all inferences in Richards' favor, as we must, *see Woodruff v. Peters*, 482 F.3d 521, 526 (D.C. Cir. 2007), we do not view Gelsomino's question as direct evidence that Richards' national origin played a role in her arrest. As explained *supra*, Gelsomino had probable cause to arrest Richards. Although not dispositive, this conclusion clearly cuts against Richards. *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019) ("[B]ecause probable cause speaks to the objective reasonableness of an arrest, its absence will . . . generally provide weighty evidence that the officer's animus caused the arrest, whereas *the presence of probable cause will suggest the opposite.*" (emphasis added) (citation omitted)). Granted, "intentionally discriminatory application of laws" "based on considerations such as race" and national origin violates equal protection even if probable cause exists. *Whren*, 517 U.S. at 813. But given that the existence of probable cause places a thumb on the scale against unlawful discrimination, Gelsomino's one question to Richards, without more, would not permit a reasonable juror to conclude that Richards was arrested because of her national origin. *See Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 576 (D.C. Cir. 2013) (per curiam) ("In some . . . discrimination cases, there is no direct evidence of discriminatory intent—that is, no 'statement that itself shows racial or gender [or national origin] bias in the decision.'" (alterations and citation omitted)). Because Gelsomino's question—"where were you born?"—does not *ipso facto* constitute direct evidence of discriminatory animus and because Richards did not identify any similarly situated persons whom Gelsomino declined to

arrest, we affirm the district court's summary judgment grant to Gelsomino on Richards' Fifth Amendment allegation.³

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

³ Because we conclude that Gelsomino did not violate Richards' constitutional rights, we do not reach Gelsomino's qualified immunity defense. *See Richards*, 2019 WL 1535466, at *4.