

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION

FILED
 AUG 20 1999
 MICHAEL N. MILBY, CLERK OF COURT

Claudia Navarro Pineda, Individually §
 and as Representative of the Estate of §
 Pedro Oregon Navarro; **Ana Isabel Lores**, as §
 next friend of **Ashley**, minor daughter of §
 Pedro Oregon Navarro; **Blanca Lidia Viera**, §
 as next friend of **Belinda**, minor daughter of §
 Pedro Oregon Navarro; **Rogelio Oregon** §
 Navarro; **Salvador Lopez**; and **Nelly Mejia**. §

Plaintiffs

v.

City of Houston; **Darrell H. Strouse**; §
 D.R. Barrera; P.A. Herrada; D.R. Perkins; §
 L.E. Tillery; and J. R. Willis. §

Defendants

Cause No. H-98-3877

Jury Requested

**Defendant Darrell Strouse's Response to Plaintiffs' Motion
 For Partial Reconsideration of Qualified Immunity Ruling**

TO THE HONORABLE SIM LAKE, UNITED STATES DISTRICT JUDGE:

Defendant Darrell Strouse responds to the **Plaintiffs' Motion for Patrial Reconsideration of Qualified Immunity Ruling**. Defendant Strouse respectfully asks that the Court's ruling regarding wrongful death be affirmed on reconsideration. Plaintiffs argue that the officers entry,

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if illegal, proximately caused the death of Pedro Oregon under the Texas Wrongful Death Act.¹ Defendant Strouse responds by reviewing the Court's qualified immunity analysis, by showing two distinct events that break the chain of causation, and notes the effect of the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code Ann. 101.001, et seq. (Vernon).

Posture of the Case

Plaintiffs sued defendant for violation of their Fourth Amendment rights under 42 U.S.C. § 1983, and pendent state claims for wrongful death.

Defendant answered, claiming his affirmative defense of qualified immunity.

Defendant Strouse filed a Motion to Dismiss and a Motion for Summary Judgment. On July 29, 1999, this Court partially granted Defendant Strouse's Motion to Dismiss. Plaintiffs' Fourth Amendment claims regarding warrantless entry, and the false arrest of Nelly Mejia remain.

Plaintiffs here ask for reconsideration of the Court's ruling dismissing the wrongful death claim against Defendant Strouse.

Qualified Immunity

The Court correctly ruled that Darrell Strouse is immune from personal liability for the death of Pedro Oregon. The Plaintiffs do not claim that Darrell Strouse used excessive force against Pedro Oregon. Likewise, Defendant Strouse had no part in the arrest of Pedro Oregon. Defendant Strouse was barely inside the apartment when the shooting began in the back bedroom. He dove for cover and remained there until the shooting stopped.

¹ TEX. CIV. PRAC. & REM. CODE § 71.001 *et seq.*

Fourth Amendment analysis requires an objective review of the totality of circumstances known to the arresting officer at the snapshot-moment of arrest. The plaintiffs' new proximate cause claim, assumed in the most favorable light, seems to claim that Darrell Strouse was involved at the moment of the decision-to-arrest. The decision-to-arrest and the arrest are two distinct moments in time. The distinction is important. *United States v. Tinkle*, 655 F.2d 617 (5th Cir. 1981), cert. denied, 455 U.S. 924, 102 S.Ct. 1285, 71 L.Ed.2d 467 (1982):

As the Supreme Court stated in considering the constitutionality of a warrantless arrest, the validity "depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it" *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). See *United States v. Savage*, 564 F.2d 728, 732 (5th Cir. 1977).

The critical time is the moment of arrest, not the moment the officer makes the decision to arrest. Two hypothetical situations focus this distinction. Imagine an officer who comes into possession of sufficient circumstantial evidence to convince even the most cautious officer that John Doe has committed an offense. He starts out to arrest Doe. While searching for Doe the officer is told by his superior that another person has confessed to the crime and that Doe has been provided with an unqualified alibi. Consider the reverse situation. An overzealous watch commander directs an arrest of John Doe based solely on suspicion. While the arresting officer is searching for Doe, another defendant implicates him. Armed with this information eyewitnesses are quizzed who make positive photo identification of Doe. This information is relayed to the arresting officer just before he locates Doe. In each situation, in determining probable cause, the factual situation which must control is that which exists at the moment of arrest. Consequently, we find no substance to the contention that an arrest is invalid if it is not supported by probable cause at the time the decision to arrest is made.

The moment of arrest of Pedro Oregon occurred at his bedroom door. Officers Barrera, Perkins and Herrada considered facts and circumstances² at that bedroom door that Darrell Strouse

² The officers at the bedroom door say that Pedro Oregon had a gun, and that he pointed it at them. Their justification to arrest, or not, and the amount-of-force to effect the arrest is an independent, split-second judgment.

could not possibly know. He was at the threshold of the apartment. He did not participate in the arrest or the use-of-force to effect the arrest. Plaintiffs' conclusory allegation that Darrell Strouse is implicated by a prior decision-to-arrest (an allegation hotly contested³) does not allege a constitutional violation, if true.⁴ Because plaintiffs fail to state a claim, Darrell Strouse need not justify that his only related action, taking cover, was objectively reasonable.

Proximate Cause

Plaintiffs allege negligence under the Texas Wrongful Death Act, and now claim that the officers entry, if unlawful, proximately caused the death of Pedro Oregon. This conclusion is not supported by fact or law. *Hart v. O'Brien*, 127 F.3d 424 (5th Cir. 1997)⁵; *Blackwell v. Barton*, 34 F.3d 298, 301 (5th Cir.1994):

³ All officers maintain that they intended to ask for consent to enter. Probable cause and the moment-in-time element are questions of law. *U.S. v. Castro*, 166 F.3d 728 (5th Cir. 1999) (en banc) (The presence of probable cause is a mixed question of fact and law. *United States v. Wadley*, 59 F.3d 510, 512 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 240 (1996). We will not disturb the factual findings of the district court absent clear error, although the ultimate determination of whether there is probable cause for the arrest is a question of law we review de novo. *Id.*)

⁴ *Sanchez v. Swyden*, 139 F.3d 464 (5th Cir. 1998)(The Supreme Court has warned against vague or general assertions of constitutional rights and has required a § 1983 plaintiff to state with specificity the constitutional right that has been allegedly violated otherwise, liability could be imposed in every case. See *Anderson v. Creighton*, 483 U.S. at 639, 107 S.Ct. at 3038-39.)

⁵ *Hart, supra* (The Supreme Court in *Franks v. Delaware* established that an officer is liable for swearing to false information in an affidavit in support of a search warrant, provided that : (1) the affiant knew the information was false or would have known it was false except for the affiant's reckless disregard for the truth; and (2) the warrant would not establish probable cause without the false information. 438 U.S. at 171, 98 S.Ct. at 2684. Allegations of *negligence* or innocent mistake are insufficient.)

On the basis of Daniels and Herrera, the district court determined that the evidence created a fact question for the jury: whether Barton's conduct constituted mere *negligence* or whether it amounted to reckless disregard for Blackwell's rights. The court mentioned Brown but chose instead to evaluate the evidence under the Fourteenth Amendment.

We hold that Blackwell's section 1983 claim against Barton for illegal arrest and detention is properly considered under the *Fourth Amendment*, the more specific constitutional right implicated by her allegations. In *Graham v. Connor*, 109 S.Ct. 1865 (1989), the Supreme Court held that all allegations of excessive force during an arrest, investigatory stop, or other seizure should be analyzed under the Fourth Amendment's "reasonableness" standard, rather than under a substantive due process approach:

"Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." 109 S.Ct. at 1871.

See also *Tennessee v. Garner*, 105 S.Ct. 1694 (1985) (analyzing claim of excessive force to effect arrest solely under *Fourth Amendment* notwithstanding complaint's allegations of violations of Fourth and Fourteenth Amendments); *Albright v. Oliver*, 114 S.Ct. 807, 811-813 (1994) (plurality opinion). Although the present case does not involve a claim of excessive force, the reasoning of *Graham* is equally applicable to Blackwell's claim for illegal arrest based on mistaken identity.

This is not a case of random attack, mistaken address, corruption, or personal vendetta. The officers had reason to be there, and legitimately suspected criminal activity at this specific address. In short, they were doing their job. This Court has ruled that material issues of fact remain regarding the officers entry into the apartment. Whether a jury finds facts supporting probable cause and exigent circumstances, or not, it does not follow that unlawful entry causes per se liability for every act after the entry. If this were true, every successful suppression hearing would result in a constitutional violation.

No one likes to have the police enter their home to search for evidence that might send them to prison. Searches supported by absolute probable cause are routinely protested by criminals during the execution of the warrant. The criminal's remedy for unlawful search is exclusion of evidence – not violent confrontation. Texas residents have an affirmative duty to submit to arrest or search, even if unlawful. TEX. PEN. CODE § 9.31(b)(2). Pedro Oregon pointed a pistol at uniformed officers, which was the intervening cause of his death.

The second intervening cause was the independent judgment of Officers Barrera, Perkins, and Herrada. Each officer had to determine whether Pedro Oregon's act constituted a crime, and what amount of force was reasonable to effect the arrest under the circumstances known to them. Each officer had to rely upon his training and experience to instantly decide these life-or-death questions. "Shoot, Don't-Shoot" is fundamental to officer survival and is an individual skill. Police officers cannot stop to ask permission before reacting to deadly situations. This is not squad-on-line basic military training. This is the real-world, where **most** police shoot-outs occur in seconds, with 7 to 10 feet separating combatants. He who hesitates, dies.⁶

Sergeant Strouse had no duty to approve, validate, second-guess, or supervise the instantaneous actions of Officers Barrera, Herrada, or Perkins at Pedro Oregon's bedroom door. Their independent judgment was an intervening cause, breaking the chain of causation. If they acted

⁶ *Sanchez v. Swyden*, 139 F.3d 464 (5th Cir. 1998) (For example, the Supreme Court has expressed concern that expansive civil liability for actions taken while on duty may cause police officers to hesitate before acting [in] a situation that could produce unwelcome results. See *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986); *Briscoe v. LaHue*, 460 U.S. 325, 343, 103 S.Ct. 1108, 1119-20, 75 L.Ed.2d 96 (1983).)

reasonably, in response to an immediate deadly threat, all officers are immune. If they erred in judgment (as plaintiffs claim), their error was not foreseeable by Darrell Strouse.

Finally, plaintiffs' state law negligence claims against Defendant Strouse and the City regarding unlawful entry are not cognizable under the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code Ann. 101.001, et seq. (Vernon). *Campbell v. City of San Antonio, et al.*, 43 F.3d 973 (5th Cir. 1995).

Conclusion

Remember, to HPD's credit, hundreds, if not thousands, of similar searches occur each year in Houston, Texas, without incident. Some searches find admissible evidence, some do not. Some searches are not upheld on judicial review. Evidence is suppressed. However, under no circumstances should anyone ever think that they have the right to resist a search. It is not the law, and hopefully, never will be.

Prayer

On reconsideration, Defendant Darrell Strouse asks the Court to affirm his ruling dismissing plaintiffs' claims under the Texas Wrongful Death Act. Defendant Strouse asks for any other relief to which he may be entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I mailed a copy of Defendant Strouse's Response to Plaintiffs' Motion for Reconsideration to the following counsel of record, on August 19, 1999.

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