OA 5-5-98

FILED
SID J. WHITE
APR 16,1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 91,519
Lower Tribunal Case Number 96-2265

BARBARA WHITE GENTILE,

Petitioner,

vs.

GARY BAUDER,

Respondent.

REPLY BRIEF OF PETITIONER

ROBERT A. GINSBURG
Miami-Dade County Attorney
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128-1993
Telephone: (305) 375-5151
Fax: (305) 375-5634

By

Thomas H. Robertson
Assistant County Attorney
Florida Bar Number 301991

And

James J. Allen
Assistant County Attorney
Florida Bar Number 317861

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

Other Authorities: **Page(s)**

ARGUMENT

Bauder's Response Brief is replete with blatant errors of law, misstatements of fact, and unsupported assumptions, Specifically, he completely misstates the law of collateral estoppel, and misunderstands the policies and law governing qualified immunity, as well. Since he is most obviously wrong on the dispositive issue of estoppel, we begin with that issue.

I. THE DISTRICT COURT OF APPEAL ERRED IN REVERSING GENTILE'S QUALIFIED IMMUNITY SUMMARY JUDGMENT BASED ON ITS PRIOR OPINION, BECAUSE A PARTY CANNOT BE STRIPPED OF THE PROTECTION OF QUALIFIED IMMUNITY WHERE SHE WAS NOT PARTY TO THE PRIOR DECISION, AND WHERE THE ISSUES DECIDED IN THE TWO PROCEEDINGS WERE NOT IDENTICAL

Bauder first suggests that the lower appellate court did not use its decision in Bauder v. State, 613 So.2d 547 (Fla. 3d DCA 1993) ("Bauder I") to estop Gentile from receiving the protection of qualified immunity. Instead, he explains, the Third District only applied as "precedent" Bauder I, which just happened to involve the same incident. His position is ludicrous. The application of precedent, also known as the doctrine of stare decisis, relates only to questions of law, and has no relation whatsoever to the binding effect of determinations of fact. Forman v. Florida Land Holding Corp., 102 So.2d 596 (Fla. 1958). The Third District clearly and expressly ruled that since it had "previously found" that the affidavit was deficient, Gentile was stripped of

qualified immunity. That is a perfect example of the application of offensive preclusion. Also, since Bauder did not bother to file the affidavit in this case, the appellate court could not have independently determined its sufficiency vel non without relying on its prior determination. Absent the affidavit, the Third District could only have used Bauder I to preclude the raising of the issues.

Bauder also states that the extent of any issue preclusion to be used under the doctrine of collateral estoppel is determined based on federal law. He is wrong. The Supreme Court has said that the use of collateral estoppel in § 1983 cases based upon a prior state court judgment is controlled by the law of the state in which the prior judgment was issued. Allen v. McCurry, 449 U.S. 90 (1980); Kremer v. Chemical Construction Corp., 458 U.S. 1133 (1982); Haring v. Prosise, 462 U.S. 306 (1983); Micra v. Warren City School District Bd. of Education, 465 U.S. 75 (1984). The Third District has followed this standard in finding that issue preclusion is controlled by the law of the jurisdiction from which the prior judgment issued. Hochstadt v. Oranse Broadcast, 588 So.2d 51 (Fla. 3d DCA 1991).

Thus, this Court must apply Florida law in determining the preclusive effect vel non of Bauder I. However, to the extent this Court wants to look to federal decisions for instruction, the Second Circuit has specifically found that under Vermont law, police officers are not parties or in privy with the state in criminal actions, Tiernev v.

Davidson, 133 F.3d 189 (2d Cir. 1998), citing 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction, 54458 at 508 (1981) ("[A] judgment against a government does not bind its officials in subsequent litigation that asserts a personal liability against the officials."). The rational is equally applicable here. Officer Gentile was not represented by the state in the criminal action and never had a full and fair opportunity to litigate issues in that action. This is emphasized by the fact that the state evidently never raised the good faith of the officer in that action. She should not now be precluded from raising her defense based upon the result of the criminal action.

Bauder cites to R.D.J. Enterprises, Inc. v. Mega Bank, 600 So.2d 1229 (Fla. 3d DCA 1992), which stands for the proposition that the real parties in interest in litigation can be considered as parties or privy thereto for purposes of collateral estoppel. Evidently he is attempting to suggest that the officer is a real party in interest in a criminal action. Not only does he fail to cite to one case supporting that view, his position is also contrary to public policy and common sense. Public policy, and the reality of the criminal court system, should not consider the officer as the real party in interest in criminal action.

Bauder suggests that Zeidwig v. Ward, 548 So.2d 209 (Fla. 1989) approved the use of collateral estoppel without mutuality of parties. As this Court pointed out in Stoaniew

v. McQueen, 656 So.2d 917 (Fla. 1995), the Zeidwig decision is specifically limited to its compelling facts. In no way did this Court relinquish the requirement of mutuality of parties.

Bauder also tries to suggest that Trucking Emp. of N. Jersey Welfare v. Romano, 450 So.2d 843 (Fla. 1984) helps his position. In Romano, the plaintiff attempted to use a judgment of conviction from a prior criminal action to preclude the defendant from raising the same issues in a civil case. This Court refused to relinquish the mutuality of parties requirement in that *case.* Bauder argues that the Romano case is significant because it prohibited the use of offensive collateral estoppel by one who was not a party to the prior action. He argues that since, in this instance, he was a party to the criminal action it is appropriate for him to be allowed to use the prior decision for offensive collateral estoppel. What Bauder fails to understand is that Romano does not stand for the proposition that only the party to the prior action can assert offensive collateral estoppel. Instead, it stands for the proposition that in order for collateral estoppel to be properly asserted, both parties had to be parties or privy to the prior action.

Bauder finally argues that Officer Gentile has waived the argument of collateral estoppel by not raising it before the lower court. If anything was waived, it was Bauder's right to argue estoppel, since he never pled nor argued it. Bauder never argued before the trial court nor before the District

Court of Appeal that the court should apply collateral estoppel. He argued that the court should rely on Bauder I, "Mr. Bauder is content to rely upon this Court's Bauder [I] decision," but never asserted that Officer Gentile is estopped from raising her defenses based upon that decision. (Bauder's Reply Brief at 9.)

Regardless, Officer Gentile's second argument to the Third District was:

> BAUDER'S RELIANCE ON BAUDER V. STATE IS MISPLACED SINCE THAT CASE DID NOT DETERMINE THE ISSUE OF THE OFFICER'S GOOD FAITH IN PROCURING THE WARRANT

(Brief of Barbara White Gentile at page 6). In light of Bauder merely relying on the Bauder I case below and not asserting collateral estoppel, and in light of Officer Gentile's appropriate raising of the issue as presented below, the argument was not waived.

II. BECAUSE OFFICER GENTILE'S ACTIONS WERE OBJECTIVELY REASONABLE, SHE IS ENTITLED TO FINAL SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY AS A MATTER OF LAW

A. BAUDER COMPLETELY FAILED TO CARRY HIS BURDEN TO SHOW THAT A CLEARLY ESTABLISHED STANDARD OF LAW HAS BEEN VIOLATED BY OFFICER GENTILE

Bauder's brief starts out with, and contains throughout, the erroneous presumption that "[a]n affidavit given in support of a search warrant which is '...totally devoid of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause...' by definition is one which no reasonably objective police officer would submit

to a judge." Respondent's Brief at 12, quoting Bauder I. This statement erroneously presumes that Gentile knew that the affidavit was going to be found to be "...totally devoid of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause..." at the time she sought it. Bauder also incorrectly presumes that a factually similar case to the one at hand had been decided prior to the seeking of the warrant. This is just not the case. The facts of this case indicate that Officer Gentile reasonably believed that she had probable cause adequately stated in the warrant.

Bauder had the burden of showing that Officer Gentile violated clearly established law. Brescher v. Pirez, 696 So.2d 370 (Fla. 4th DCA 1997); McGory v. Metcalf, 665 So.2d 254, 258-59 (Fla. 2d DCA 1995), rev. denied, 672 So.2d 543 (Fla. 1996); Jordan v. Doe, 38 F.3d 1559, 1565 (11th Cir. 1994); Rich v. Dollar, 841 F.2d 1558 (11th Cir. 1988); Zeigler v. Jackson, 716 F.2d 847 (11th Cir. 1983). As these cases point out, the prior law must be concrete and factual, not just broad statements of general law.

Bauder did not below, and still does not cite to a single factually similar case decided prior to the issuance of the subject warrant. Instead, he cites to Garmon v. Lumskin County, 878 F.2d 1406 (11th Cir. 1989) and Kelly v. Curtis, 21 F.3d 1544 (11th Cir. 1994). Both cases are easily distinguished, because they involved affidavits which contained no facts, but instead contained only conclusions of

the officer. In Garmon, for example, the affidavit supporting the warrant, which was completed by an investigator who had relatively little involvement in the case, stated only that the affiant swore that "to the best of (his or her) knowledge and belief Teresa Ann Garmon did . . . commit the offense of false report of a crime," Id. at 1408, and "contained no facts whatsoever." Id. at 1409. A similar situation occurred in Kelly, where the claim was made that after receiving an exculpatory lab report detectives falsely averred that Kelly had possessed cocaine when they had no supporting evidence. The affidavit in support of the arrest warrant articulated neither the basis for a belief that Kelly had violated the law nor any affirmative allegation that the detective had personal knowledge of the circumstances of the alleged crime. The court then found that the detective was not entitled to qualified immunity, because the warrant in Kelly was materially similar to that in Garmon.

Here, once again, not only has Bauder failed to present such a "materially similar" case, he has not even supplied the warrant. The record is clear in this case that the affidavit did contain facts supporting the application, and that the officer made more than reasonable efforts to ensure that her affidavit passed constitutional muster.

Notably absent from Bauder's Brief is citation to any case which might be argued to constitute the clearly defined law which is so factually similar to the instant case that no reasonable officer would believe that she had probable cause.

Gentile more than satisfied her burden to demonstrate the existence of circumstances surrounding the issuance of the warrant reflecting the reasonableness of her conduct. Review by two assistant state attorneys, review by two superior officers and issuance by a circuit court judge, indicate not just a reasonable officer but, in fact, an extremely diligent officer. Bauder adduced nothing in response.

Instead, Bauder apparently relies upon a conspiracy of incompetence to justify the Third District's decision. According to Bauder, the issuing judge, the two assistant state attorneys, the judge who heard the Motion to Suppress, Officer Gentile and her supervisors all had to be grossly incompetent to have approved this warrant. Perhaps, instead of mass incompetence, "... officers of reasonable competence could disagree as to whether the warrant should issue. .." Malley v. Briggs, 475 U.S. 335, 341 (1986). Officer Gentile's actions were objectively reasonable and the case should be reversed with direction to affirm the summary judgment.

B. RELIANCE ON ADVICE OF COUNSEL, AFTER FULL AND COMPLETE DISCLOSURE, MAKES GENTILE'S CONDUCT OBJECTIVELY REASONABLE AS A MATTER OF LAW

Bauder chooses to ignore the significant case law that controls the determination of what constitutes the elements and defenses to a § 1983 action. He cites to Howlett v. Rose, 496 U.S. 356 (1990), for the proposition that elements and

defenses to § 1983 actions are defined by federal law.[1] Although this statement is true in a general sense, Bauder ignores the recognition in Howlett itself that "Congress did take common-law principles into account in providing certain forms of absolute and qualified immunity, see wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967) . . ." 496 U.S. at 383. Bauder ignores this well-established principle, instead preferring to distract this Court with immaterial, detailed recountings of Kalina v. Fletcher, 118 S.Ct. 502 (1997); Briscoe v. LaHue, 460 U.S. 325 (1983); and Tenney v. Brandhove, 341 U.S. 367 (1951), all of which apply the foregoing principles, but which involved absolute rather than qualified immunity. Respondent's Brief at 18-20. As the Supreme Court stated in Heck v. Humphrey, 114 S.Ct. 2364, 2370-71 (1994):[2]

> We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability. Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the

[1] Howlett involved the question of whether state law procedural requirements supercede the mandates of § 1983. Howlett is a supremacy issue not an issue of what is the federal law to be applied in §1983 actions.

[2] Unless otherwise expressly noted, all emphasis is supplied, and internal quotations and citations in quoted materials are omitted.

> appropriate starting point for the inquiry under § 1983 as well. Thus, to determine whether there is any bar to the present suit, we look first to the common law of torts.

Bauder is completely unable to refute Gentile's clear demonstration in her Initial Brief that the common law clearly includes the defense of advice of counsel when that advice is given and followed after a full and complete disclosure of all the relevant facts to the attorney. See 52 Am. Jur. 2d Malicious Prosecution §§ 77-87; 32 Am. Jur. 2d False Imprisonment § 69. The rationale for recognizing advice of counsel as a defense in actions such as this is expressed well by the United States Court of Appeal in Los Angeles Police Protective Leaaue v. Gates, 907 F.2d 879, 888 (9th Cir. 1990) : "[W]hen the employees of LAPD were faced with what can only be called a complex and uncertain legal issue, they sought legal advice and then followed that advice. It would be counterproductive and even oppressive were we to find that they can now be held liable in damages for their actions." The Ninth Circuit considered the obtaining of legal advice to be "just what the courts encourage officials to do" and identified it as "responsible behavior by police officials." Id.

Certainly, the legal advice obtained by Officer Gentile, after a full and complete disclosure to the attorneys, should insulate her from the type of action brought by Bauder in this case, There is absolutely nothing in the record to support Bauder's desperate claims that the legal advice was

obtained as a sham or under circumstances were the quality of the advice could be questioned. Officer Gentile was fair and complete in her disclosures to the attorneys, and was entitled to rely upon their advice.

CONCLUSION

The Third District Court of Appeal clearly erred in stripping Detective Gentile of her qualified immunity based on a prior decision to which she was not party, and which involved issues different than hers,

The Third District also erred in reversing the lower court's final summary judgment in Gentile's favor because Bauder did not and could not have proven that Gentile's actions were violative of clearly established law such that no reasonable public official would have believed them lawful, particularly in light of the unrefuted fact that two state attorneys and two circuit court judges in fact concluded that they were lawful.

Gentile therefore respectfully requests that this court REVERSE the decision of the Third District, and REINSTATE the final summary judgment in favor of Gentile.

Respectfully submitted,

ROBERT A. GINSBURG
Miami-Dade County Attorney
Suite 2810
111 Northwest First Street,
Miami, Florida 33128-1993
Telephone:(305) 375-5151
Fax: (305) 375-5634

By: _____
Thomas H. Robertson
Assistant County Attorney
Florida Bar Number 301991

and

_____
James J. Allen
Assistant County Attorney
Florida Bar Number 317861

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's Reply Brief was mailed this 15TH day of April, 1998, to: JEPEWAY AND JEPEWAY, P.A., Louis M. Jepeway, Jr. Esq., 407 Biscayne Building, 19 West Flagler Street, Miami, Florida, 33130; ANDRE A. ROUVIERE, ESQ., 145 Almeria Avenue, Coral Gables, Florida 33134; and RHEA P. GROSSMAN, ESQ. 2780 Douglas Road, Suite 300, Miami, Florida, 33133-2749.

Assistant County Attorney