11-30-2022

Irvin Harper v. City of Philadelphia

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2262

IRVIN SAMUEL HARPER,
Appellant

v.

THE CITY OF PHILADELPHIA; DETECTIVE DANIEL O'MALLEY; RICHARD ROSS, Philadelphia Police Commissioner; MARK BURGMANN, Captain of Philadelphia Police S.V.U.; AMY DELAPORTA, Social Worker at Covenant House; THE PHILADELPHIA DISTRICT ATTORNEYS OFFICE

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-18-cv-04182)
District Judge: Honorable Mitchell S. Goldberg

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
August 23, 2022
Before: GREENAWAY, JR., PORTER and NYGAARD, Circuit Judges

(Opinion filed: November 30, 2022)

OPINION*

PER CURIAM

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Irvin Harper appeals the District Court's order dismissing his complaint for failure to state a claim. For the reasons that follow, we will affirm the District Court's judgment.

Harper filed a civil rights complaint alleging, inter alia, claims of false arrest and malicious prosecution based on his arrest and detention on charges of raping two women. He stated that he was acquitted of one charge and that the other charge was dismissed. The District Court twice granted Appellees' motions to dismiss the complaint but gave Harper the opportunity to amend his complaint each time. After Harper filed a second amended complaint, Appellees again filed motions to dismiss. The District Court dismissed the second amended complaint and closed the case. Harper filed a notice of appeal.

We have jurisdiction pursuant to 28 U.S.C. § 1291 and review the District Court's order granting the motions to dismiss de novo. Dique v. N.J. State Police, 603 F.3d 181, 188 (3d Cir. 2010). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation and internal quotation omitted). It is not enough for a plaintiff to offer only conclusory allegations or a simple recital of the elements of a claim. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). We may affirm the District Court on any ground supported by the record. Tourscher v. McCullough, 184 F.3d 236, 240 (3d Cir. 1999).

As noted above, Harper claims that he was falsely arrested for the two rapes. The Fourth Amendment requires that arrests be supported by probable cause. Thus, to state a claim for false arrest, a plaintiff must establish that probable cause was lacking. James v.

City of Wilkes-Barre, 700 F.3d 675, 680 (3d Cir. 2012). Probable cause exists when the facts known to the officer are sufficient to warrant a reasonable person to believe that an offense has been committed. Orsatti v. N.J. State Police, 71 F.3d 480, 483 (3d Cir. 1995). Mere suspicion is not enough for probable cause, but an officer is not required to have evidence to prove guilt beyond a reasonable doubt. Id. at 482-83. Because probable cause is only needed with respect to any offense that could be charged under the circumstances, see Barna v. City of Perth Amboy, 42 F.3d 809, 819 (3d Cir. 1994), establishing probable cause on one of multiple charges will defeat a claim of false arrest. Startzell v. City of Phila., 533 F.3d 183, 204 n.14 (3d Cir. 2008). Here, Harper has failed to state a claim of false arrest because, as discussed below, probable cause was established with respect to the rape charges involving the woman referred to as Bella.

Where an arrest is made pursuant to a warrant (as it was here), establishing a lack of probable cause requires a plaintiff to show "(1) that the police officer knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create[d] a falsehood in applying for a warrant; and (2) that such statements or omissions are material, or necessary, to the finding of probable cause." Wilson v. Russo, 212 F.3d 781, 786-87 (3d Cir. 2000) (internal quotations and citation omitted). An omission is made with reckless disregard if it is something a reasonable person would realize that the judge would want to know. Id. at 788. To determine whether an omission is material, the Court must predict whether a reasonable judge would conclude that a corrected affidavit was insufficient to establish probable cause. Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997). Harper acknowledges that Bella told Appellee

Detective O'Malley that Harper had raped her and has not alleged any information withheld by Detective O'Malley that would have been material to a finding of probable cause with respect to this rape.

More specifically, in the affidavit of probable cause, Detective O'Malley asserted that Bella stated that she went with a man she knew as "Gotti" because he indicated that he could assist her in finding employment.[1] After they entered a building, Gotti pulled out a gun and forced her to perform oral sex. He then raped her. When Gotti texted Bella a few days later, she went with him out of fear and he raped her again. She identified Harper as Gotti from a photo. This was sufficient to establish probable cause. See Sharrar v. Felsing, 128 F.3d 810, 818 (3d Cir. 1997) ("When a police officer has received a reliable identification by a victim of his or her attacker, the police have probable cause to arrest.") abrogated on other grounds by Curley v. Klem, 499 F.3d 199 (3d Cir. 2007).

On appeal, Harper asserts that Bella told Detective O'Malley that her roommate had also been raped by Harper but that the roommate had denied it. He also claims that Bella told Detective O'Malley that she also had consensual sex with Harper and that she had worked as a prostitute. None of these allegations, taken as true, is material to the

[1] Because the second amended complaint references and relies on the content of the affidavit of probable cause and arrest warrant, we will consider them on appeal. See Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 177 n.2 (3d Cir. 2000); see also Pension Benefit Guaranty Corp. v. White Consolidated Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993) ("To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record.")

finding of probable cause with respect to the rape charges based on Bella's accusations. An affidavit containing the allegedly omitted information would still establish probable cause. Because there was probable cause on these rape charges, Harper has failed to state a claim for false arrest on any of the charges. Startzell, 533 F.3d at 204 n.14.

On appeal, Harper also argues that he has stated a claim for malicious prosecution. To do so, he must allege that the Appellees maliciously, and without probable cause, initiated a criminal proceeding which ended in his favor, and that he suffered a deprivation of liberty "as a consequence of" that proceeding. See Curry v. Yachera, 835 F.3d 373, 379 (3d Cir. 2016); see generally Thompson v. Clark, 142 S. Ct. 1332, 1337 (2022). Harper cannot state a claim for malicious prosecution because he has not alleged that he suffered a deprivation of liberty based on the remaining rape charge with respect to the woman referred to as Jessica. He has not alleged that he would not have otherwise been detained during the time at issue on the rape charge with respect to Bella, a firearm charge to which he pleaded guilty, and a charge of possession of a controlled substance with intent to deliver of which he was convicted.[2] See Curry, 835 F.3d at 379; Commonwealth v. Harper, 241 A.3d 398 (Pa. Super. Ct. 2020).

[2] The arrest warrant also charged Harper with possession of a firearm by a felon, and when Harper was arrested, the police found narcotics. For the firearm and drug charges, Harper was sentenced to ten to twenty years in prison.

For the reasons above, as well as those set forth by the District Court, we will affirm the District Court's judgment.[3]

[3] Because Harper did not argue his remaining claims in his opening brief, we will not consider them. See In re Wettach, 811 F.3d 99, 115 (3d Cir. 2016) (holding that appellants forfeited arguments by failing to develop them in their opening brief); Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993) (noting that "appellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief"). While he discusses some of these claims in his reply brief, that is insufficient as we do not consider arguments raised for the first time in a reply brief. Gambino v. Morris, 134 F.3d 156, 161 n.10 (3d Cir. 1998).