

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 28 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SCOTT KERNS,

Plaintiff - Appellee,

v.

UNITED STATES OF AMERICA,

Defendant - Appellant.

No. 07-15769

D.C. No. CV-04-01937-NVW

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted November 20, 2008
San Francisco, California

Before: CANBY and WARDLAW, Circuit Judges, and MILLS,** District Judge.

The United States of America appeals from the district court's judgment after a bench trial imposing liability under the Federal Tort Claims Act ("FTCA") for damages resulting from Scott Kerns's mistaken arrest and imprisonment. We

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's legal conclusions and review for clear error its factual findings, *see Howard v. United States*, 181 F.3d 1064, 1066 (9th Cir. 1999), and we reverse.

The FTCA waives the United States' sovereign immunity for certain torts, but exempts any claim arising out of torts which include false arrest or false imprisonment. 28 U.S.C. § 2680(h). The statute contains an exception allowing claims arising out of false arrest or false imprisonment that involve "acts or omissions of investigative or law enforcement officers of the United States Government." *Id.* No evidence in the record establishes that the intelligence analyst defendants were "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law," as required by section 2680(h). Accordingly, a plain reading of the statutory definition of "investigative or law enforcement officer" indicates that the intelligence analyst defendants are not such officers. Therefore, the district court correctly determined that a claim of false arrest and imprisonment based on the conduct of the intelligence analyst defendants is plainly foreclosed under section 2680(h).

We conclude that the district court erred in permitting Kerns to proceed on his alternative theory based on the Arizona tort of gross negligence by an investigator. We have specifically held that a plaintiff "cannot sidestep the

FTCA's exclusion of false imprisonment claims by suing for the damage of false imprisonment under the label of negligence," *Snow-Erlin v. United States*, 470 F.3d 804, 809 (9th Cir. 2006), as this "would permit evasion of the substance of § 2680(h)'s exclusion of liability," *id.* at 808 (alterations and internal quotation marks omitted). The gravamen of Kerns's claim is clearly the injury and damages resulting from his false arrest and imprisonment. Therefore, his claim is barred under section 2680(h) as arising out of a false arrest or false imprisonment. *Id.* at 809. Accordingly, we reverse the district court's judgment in favor of Kerns and remand for dismissal of this action for lack of subject matter jurisdiction.

REVERSED and REMANDED.