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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT WHEELER,

Plaintiff - Appellee,

v.

BRENT COSS; CITY OF RENO,

Defendants - Appellants.

No. 08-15270

D.C. No. CV-06-00717-RAM

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Robert A. McQuaid, Magistrate Judge, Presiding

Argued and Submitted June 10, 2009
San Francisco, California

Before: HUG, B. FLETCHER and HAWKINS, Circuit Judges.

Reno Police Officer Brent Coss appeals the district court order denying him qualified immunity for arresting plaintiff Robert Wheeler. The district court granted partial summary judgment to Wheeler, holding that there was no probable

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

cause for his arrest and that Coss was not entitled to qualified immunity. We agree with the district court and, reciting the facts only as necessary, affirm its decision.

Coss argues that he had probable cause to arrest Wheeler for harassment and, even if probable cause was lacking, he was entitled to qualified immunity because it would not have been clear to a reasonable officer that the arrest was unlawful.

“Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested.”

Rodis v. City & County of San Francisco, 558 F.3d 964, 969 (9th Cir. 2009)

(internal quotation omitted). “In establishing probable cause, officers may not

solely rely on the claim of a citizen witness that he was a victim of a crime, but

must independently investigate the basis of the witness’ knowledge or interview

other witnesses.” *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925

(9th Cir. 2001). In Nevada, a person is guilty of harassment if he or she, without

lawful authority, knowingly threatens another person with future bodily injury, and

the targeted person is placed in reasonable fear that the threat will be carried out.

Nev. Rev. Stat. § 200.571(1). Thus, to have probable cause to arrest Wheeler for

harassment, Coss needed trustworthy evidence derived from independent investigation that Wheeler had threatened his wife, Tina Brown.

The district court listed several specific facts upon which Coss based his probable cause determination. Coss knew that Brown had called the police and reported that Wheeler had said he was coming home to “deal with her.” He also knew from the caller ID box she showed him that Wheeler had indeed called the house that day. He observed that she was behaving like she was actually scared of Wheeler, and Brown told Coss that Wheeler had been acting unstable and had access to guns. However, in the middle of Coss’s discussions with Brown, he received a call from dispatch informing him that Wheeler was at the local police substation requesting a police escort home to keep the peace. After a brief discussion with Wheeler at the substation, in which he observed that Wheeler seemed very upset, Coss arrested Wheeler.

The district court noted that Coss “admitted he had no idea who was telling the truth” and that he failed to investigate Wheeler’s purported instability, access to firearms, or alleged statement to his wife. Based on the totality of the circumstances, the district court concluded that Coss lacked probable cause. We agree. The record contains no evidence that Coss or any of the other police officers ever asked Wheeler whether he actually made the alleged threatening

statement. Even if Wheeler's statement to Brown that he was coming home to "deal with her" could constitute a threat of future harm, Wheeler's subsequent act of going to the substation to seek a police escort to help keep the peace between him and Brown cast significant doubt on Brown's allegations that the statement was a threat, that Wheeler was violent, or that her fear of him was reasonable. Without further investigation revealing facts indicating a crime had been committed, Coss did not have probable cause to arrest Wheeler for harassment.

We also must consider whether despite the lack of probable cause, Coss's belief that he had probable cause was reasonable. *See Rodis*, 558 F.3d at 970. Coss argues that a reasonable officer would have thought he had probable cause to arrest Wheeler for harassment or violation of a temporary protective order. In light of the ambiguous, allegedly threatening language and Wheeler's request for police assistance to avoid violence, no reasonable police officer would have thought there was probable cause to arrest Wheeler for harassment. In regard to the reasonableness of arrest for violation of a protective order, Brown provided Coss paperwork that included an order scheduling a hearing to determine whether a protective order should issue. The hearing was scheduled to occur two days *after* Coss made the arrest. No reasonable officer would have concluded he had probable cause to arrest a person for violating a protective order that did not exist.

See Beier v. City of Lewiston, 354 F.3d 1058, 1069-70 (9th Cir. 2004) (requiring an arresting officer to read a protective order or ascertain its terms from a law enforcement source before making an arrest based on the order).

AFFIRMED.