

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEONARD HALE, individually
and as Next Friend of SEAN LYSHER
and SHANNA LYSHER,

Plaintiffs,

Civil No. 01-74689
Hon. John Feikens

v.

SCOTT B. KART and DAVID W. THOMAS,
DEPUTY SCHLUNDT, TONY McNEIL,
SGT. ROGER ELDER, individually and in
their capacity as officers from the Jackson County
Sheriff's Department, THE COUNTY OF JACKSON,
a Municipal Corporation, LARRY ROBERTS,
CHRISTOPHER JACOBSON, SGT. JON JOHNSTON,
individually and in their capacity as officers
of the Blackman Township Police Department,
and the TOWNSHIP OF BLACKMAN, a Municipal
Corporation,

Defendants.

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OPINION AND ORDER

INTRODUCTION

Plaintiffs Leonard Hale and his two children bring this §1983 action over the execution of a search warrant upon plaintiffs' apartment by the Jackson County Sheriff Department and Blackman Township Police Department on or about December 19, 1998. Plaintiffs bring federal 28 U.S.C. §1983 claims for illegal search without probable cause, excessive force, pattern and practice of constitutional violations and a state law claim for negligent infliction of emotional distress.

Defendants now file motions for summary judgment. For the reasons stated below, defendants' summary judgment is GRANTED in part and DENIED in part.

BACKGROUND FACTS

Hale has custodial custody of his two young children, Sean and Shanna Lysher. Hale Dep. at 8. JeriJo Lysher (Lysher) is Sean and Shanna's mother and she visits them about once every three months. Id. at 7, 21. On December 18, 1998, Lysher came to Hale's apartment to celebrate her birthday with her children. Id. at 34. Hale testifies that he and Lysher had several beers together and after Hale ran out to get more beer around 8 p.m., Lysher became intoxicated with illegal prescription drugs and started acting "goofy." Id. at 64-65, 87-88. She became agitated and began screaming profanities and calling Hale names. Id. at 94-95, 101. Hale asked her to leave, then dialed 9-1-1 to requested police help to escort Lysher out of his apartment at 12:30 a.m. Id. at 106-107.

When Officer Jacobson arrived at Hale's apartment, Lysher told Jacobson that Hale kept large amounts of illegal prescription medication and cash in his bedroom. Jacobson Dep. 16-17. Lysher also told Jacobson that Hale was selling the prescription medication, including Vicodin, illegally. In response, Hale told Jacobson that Jacobson could not go into the bedroom without a search warrant. Id. at 18. Jacobson recalled that one month prior to the incident, Aumack's Pharmacy had been broken into and large amounts of Vicodin and other prescription medication were stolen, so he brought Lysher back to the Blackman Township Police Department to elicit more information

from her. Id. at 20, 29-30. Jacobson also called for a surveillance car to make sure that Hale did not flee or destroy the evidence. See Affidavit for Search Warrant, Def. Jackson County Ex. 2 (“Kart Affidavit”).

At the Blackman Township Police Department, Jacobson turned Lysher over to Deputy Kart of the Jackson County Sheriff’s Department, who was in charge of the Aumack’s Pharmacy investigation. Lysher told Kart that Hale was selling illegal prescription drugs. Id. She also told Kart that she had stayed with Hale for two weeks and had accompanied him on several drug drops. Id. Although Kart knew that Lysher and her family had a history of illegal prescription drug use, he had previously never used Lysher as an informant and did not independently corroborate Lysher’s story about Hale. Kart Dep at. 58, 60-64.

Relying exclusively on Lysher’s tip, Deputy Kart obtained a search warrant from Judge Hall of the Jackson County Circuit Court. Kart allegedly spoke to Judge Hall, but did not produce the contents of that conversation. Kart Dep. at 66. The affidavit did not state that Lysher was intoxicated and upset or the fact that Lysher’s story had not been independently corroborated. See Kart’s Affidavit.

Kart assembled a team of Jackson County deputies and Blackman City police officers to execute the search warrant. Early in the morning, the officers broke down Hale’s door, grabbed him while he was putting on his pants, pushed him to the floor and handcuffed him. Hale Dep. at 127-137. Hale testifies that he was face-down on the floor for about an hour while the officers conducted the search. Id. at 136-37. Hale

claims that his back pain got severely worse after the incident, although he did not go see a doctor or take any affirmative steps to have his back examined. Id. at 147-50, 194-96. The officers found many bottles of unmarked medication¹ and \$9,751 of cash in Hale's bedroom. Kart Dep. at 80.

No charges were ever filed against Hale for the prescription drugs found in his home. Kart Dep. at 86.

ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). I must view the evidence and any inferences drawn from the evidence in a light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citations omitted), Redding v. St. Edward, 241 F.3d 530, 532 (6th Cir. 2001). In this case, plaintiffs are the nonmoving party and I must view the evidence in their favor.

B. Municipal Immunity

The United States Supreme Court has held that a municipality cannot be held

¹ Hale testifies that the unmarked medications were pain-related medication for his back pains. He claims that they were unmarked so that Lysher would not steal them.

liable under § 1983 solely because it employs a tortfeasor. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In Monell, the Supreme Court held that a municipality may be sued only when the action that is alleged to be unconstitutional is based on a policy statement, regulation, or decision which has been officially adopted and promulgated by the municipality. Id. at 690. A municipality will not be held liable under § 1983 for random, unauthorized acts of its employees. Id. at 691. Plaintiffs do not provide any evidence that the raid on Hale's apartment was made pursuant to a municipal policy. Thus, Blackman Township and Jackson County are entitled to summary judgment on all counts.

C. Qualified Immunity

Qualified immunity is “an entitlement not to stand trial or face the other burden of litigation.” Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). In determining the issue of qualified immunity, I must first determine whether the officer's alleged conduct violated a constitutional right and, if so, whether that right was clearly established. Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Even if a right is clearly established and violated, defendants are still entitled to qualified immunity if their actions were reasonable. See Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039-40, 97 L.Ed.2d 523 (1987).

D. Illegal Search without Probable Cause

A search warrant based on an informant's tip is evaluated under the *totality of circumstances* test. Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527

(1983).

Officers are entitled to rely on a judicially secured warrant for immunity in a § 1983 action claiming illegal search and seizure, unless the warrant is so lacking in indicia of probable cause that official belief in the existence of probable cause is unreasonable. Malley v. Briggs, 475 U.S. 335, 344-45, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). An officer cannot rely on the judicial determination of probable cause if he knowingly makes false statements or omissions in the affidavit such that, but for those falsities, the warrant would not be based on probable cause. Yancey v. Carroll County, 876 F.2d 1238, 1243 (6th Cir.1989). What is reasonable for a particular officer depends on his role in the search. The officers in charge of leading the search, in contrast to the officers who are merely following orders, “are responsible for ensuring that they have ... a proper warrant that in fact authorizes the search and seizure they are about to conduct.” Ramirez v. Butte-Silver Bow County, 298 F.3d 1022, 1027 (9th Cir. 2002).²

In this case, Lysher’s credibility as an informant is suspect. Hale testified that Lysher was severely intoxicated with illegal prescription drugs and had about twelve cans of beer before Jacobson came to pick her up. He also testified that Lysher was extremely agitated, screaming profanities and calling him names. Jacobson testified

² United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) is inapplicable here. The Supreme Court in Leon held that the fourth amendment exclusionary rule does not apply to evidence obtained by officers who reasonably relied on a judicially secured warrant that is subsequently found to be without probable cause. However, Leon does not provide a defense against § 1983 actions.

that Lysher was extremely upset at Hale because he asked her to leave. Jacobson Dep. at 16, and 21-22. Deputy Kart also testified that she was “intoxicated” and that he smelled alcohol from Lysher’s breath when he interviewed her.³ Kart Dep. at 57, 64. Moreover, Kart did not corroborate Lysher’s information with any independent police investigation, which might otherwise establish probable cause despite Lysher’s unreliability as an informant. See U.S. v. Tuttle, 200 F.3d 892 (6th Cir. 2000) (“information received from an informant whose reliability is not established may be sufficient to create probable cause when there is some independent corroboration by the police of the informant's information”). Under the totality of circumstances, a reasonable jury can find that Lysher’s credibility was so lacking that it was unreasonable for Kart to rely on the warrant. Thus, a genuine issue of material fact exists and summary judgment is denied against Kart on this count.

However, plaintiffs fail to present any evidence that the other defendants named in the suit knew of the deficiencies in Kart’s Affidavit or failed to act on reasonable reliance upon the search warrant. Thus, they are entitled to qualified immunity and summary judgment is granted to those officers.

E. Excessive Force

³ To be sure, the fact that Lysher was intoxicated and highly agitated does not mean, as a matter of law, that a reasonable officer would not trust Lysher’s tip. Indeed, some people are more candid when they are drunk than when they are sober. Nevertheless, viewing the evidence in a light most favorable to the plaintiffs, I must conclude that whether a reasonable officer would believe Lysher’s tip in her intoxicated state is a question of fact for the jury.

Plaintiffs present no evidence to support their claim of excessive force. Hale testifies that he was pushed to the ground by the officers, but did not suffer any scars, injuries, or bruises. Hale Dep. at 147-50. Although he claims that his back pains worsened after the incident, he testified that he did not go to an emergency room or a specialist to examine his condition. Hale Dep. at 194-96. Shoving a suspect to the ground during the execution of a search warrant is not the use of excessive force. Thus, summary judgment is granted as to claims of excessive force.

F. Pattern and Practice of Constitutional Violations

Plaintiffs fail to present any evidence to support a claim for pattern and practice of constitutional violations. Thus, summary judgment is granted as to those claims.

G. State Tort Claim of Negligent Infliction of Emotional Distress

Under Michigan law, an officer is given immunity from tort liability in the performance of his public duties unless he is grossly negligent. See Michigan Governmental Tort Immunity Act, MCLA §§ 691.1401 et seq.

As discussed above, the officers did not use excessive force in the execution of the search warrant. Neither did they exhibit extreme and outrageous behavior in executing the search warrant. Thus, it cannot be said that they were grossly negligent and summary judgment is granted as to those claims.

CONCLUSION

For the foregoing reasons, defendants' summary judgment motion as to claims for excessive force, pattern and practice of constitutional violations, and intentional

infliction of emotional distress are GRANTED. Summary judgment as to the claim of illegal search without probable cause against defendants Thomas, Schlundt, McNeil, Elder, County of Jackson, Roberts, Jacobson, Johnston, and Township of Blackman is also GRANTED. Summary judgment as to the claim of illegal search without probable cause against defendant Kart is DENIED, and is the only surviving claim.

IT IS SO ORDERED.

John Feikens
United States District Judge

Date: _____