

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11712

Non-Argument Calendar

DOROTHY BURSE,

Plaintiff-Appellant,

versus

B. HARTZIG,
Trooper ID #FHPT09PERA00033,
DIRECTOR OF THE FHP,
in official capacity,

Defendants-Appellees,

SHERIFF OF PINELLAS COUNTY,

2

Opinion of the Court

22-11712

Defendant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:20-cv-03104-SDM-SPF

Before WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Dorothy Burse appeals the district court's summary judgment for defendants Trooper Bobby Hartzig and Colonel Gene Spaulding as to her false arrest claims. After careful review, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

These are the summary judgment facts viewed in the light most favorable to Burse. *See Hardigree v. Lofton*, 992 F.3d 1216, 1223 (11th Cir. 2021). Burse was a bus driver for Pinellas County Schools. Early on the morning of January 3, 2017, Burse took a dose of the antibiotic Bactrim, which a doctor had prescribed her two days prior. That afternoon, she picked up children from the intermediate school. While stopped at a red light on her route, her bus was rear-ended.

22-11712

Opinion of the Court

3

The first officer to arrive had Burse pull onto a side street and—after finding no damage to the bus—told her she could leave. But Burse’s dispatcher told her to remain at the scene until her supervisor arrived.

Florida Highway Patrol Lieutenant Richard Benton then arrived at the scene, as did Burse’s supervisor. Lieutenant Benton spoke with Burse and observed signs of impairment: confusion and lack of alertness, difficulty locating paperwork and answering questions, and dishevelment. He also spoke with the children on the bus—who thought Burse was out of sorts—and overheard both Burse’s dispatcher and supervisor say Burse had left “a bunch of kids” at the school. According to Lieutenant Benton, Burse’s supervisor also thought “something wasn’t right” and believed Burse was drunk or impaired. So Lieutenant Benton called Trooper Hartzig to the scene, shared these observations, and instructed him to conduct a DUI investigation. Trooper Hartzig had both training in conducting field sobriety exercises and a year’s experience in the DUI Enforcement Division; Lieutenant Benton also had training and significant experience investigating DUIs.

When Trooper Hartzig spoke with Burse, he observed that she had a dry mouth and watery, glassy eyes with “extremely constricted pupils”; she also appeared nervous, lethargic, confused, disoriented, and unsteady on her feet (exhibiting balance problems

and staggering rather than walking in straight lines).¹ Based on his observations, Trooper Hartzig told Burse he suspected she was under the influence of narcotics and was going to investigate her for a DUI.

Trooper Hartzig’s interactions with Burse—from when he informed her of his DUI suspicions to her arrest—were captured by dashboard camera. Burse licked her lips repeatedly throughout; she was also slow to respond to questions, at times, and slow to react when Trooper Hartzig asked her to stick out and lift her tongue so he could examine it. Burse told Trooper Hartzig she rarely drank and had taken only Bactrim that day. She also expressed concerns about the field sobriety exercises—saying at one point, “I don’t know if I can hobble on one leg or not,” at another point telling Trooper Hartzig “right now I am a nervous wreck” and giving him a “heads up” that she couldn’t recite the alphabet backwards. But she consented to the exercises, which Hartzig conducted within his dashcam’s view.

¹ Burse argues there’s a genuine dispute as to whether she was experiencing vision or balance issues at the scene. We disagree because Burse relies on evidence from long before the accident (testimony about how she felt upon arriving at work at 4:45 a.m.) and from several hours after Trooper Hartzig’s investigation (results from another DUI evaluation that evening) as contradicting his observations. Burse’s argument is also contradicted by the video from Trooper Hartzig’s dashboard camera. *See Scott v. Harris*, 550 U.S. 372, 380–81 (2007) (on summary judgment, court must “view[] the facts in the light depicted by the videotape”).

22-11712

Opinion of the Court

5

During both field sobriety exercises, Trooper Hartzig had to repeat his instructions to Burse. The first exercise—“walk and turn”—involved taking a series of heel-to-toe steps along a painted line. While listening to Trooper Hartzig’s instructions, Burse struggled to maintain her balance in the starting position (standing on the line, with her feet heel-to-toe), saying at one point “I’m not ready because I’m wobbly.” While walking, Burse remained unstable: her legs shook, and she paused, took side steps, or raised her arms numerous times to steady herself. She also failed to take heel-to-toe steps.

The second field sobriety exercise—“one-leg stand”—involved counting aloud while raising one leg off the ground with its toe pointed. While performing this exercise, Burse wobbled, leaned, and raised her arms to keep her balance; she also touched her raised foot to the ground several times. Burse testified that she felt nervous and upset about the field sobriety exercises but didn’t feel impaired; she acknowledged, however, that she couldn’t perform the “walk and turn” exercise.

After conducting the exercises, Hartzig concluded he had probable cause that Burse had driven the bus while impaired and so arrested her for DUI and child neglect. He transported her to the Pinellas County Jail, where she was evaluated by drug recognition expert Trooper William Smith. Trooper Smith—who tested Burse’s autonomic responses and vital signs along with conducting additional sobriety exercises—concluded Burse was not impaired. Burse’s two breath samples tested at 0.000, and an eventual

urinalysis detected no controlled substances. Burse was eventually released and the charges against her dropped.

Burse sued in December 2020, asserting 42 U.S.C. section 1983 and state-law false arrest claims against Trooper Hartzig (Counts I and III), as well as a claim (Count IV) seeking to hold Colonel Gene Spaulding, in his official capacity as Florida Highway Patrol Director, liable for Trooper Hartzig's tortious conduct under Florida Statutes section 768.28(9)(a).²

The defendants moved for summary judgment on all counts, and the district court granted their motion in full. The district court concluded that Trooper Hartzig had “at least” arguable probable cause to arrest Burse and so was entitled to qualified immunity. The district court noted that Trooper Hartzig wasn't required to investigate every innocent explanation, perform specific tests, or consult a drug recognition expert before arresting someone who performed poorly on field sobriety exercises—which “afford[] an objective standard that eliminates the need for an officer to assess each proffered innocent explanation for exhibiting signs of intoxication.” And the district court concluded that Burse's claim against Colonel Spaulding failed because Trooper Hartzig was entitled to qualified immunity, because Colonel Spaulding enjoyed Eleventh Amendment immunity as to section 1983 claims,

² Burse also alleged a section 1983 claim against Pinellas County Sheriff Bob Gualtieri but later stipulated to dismissal with prejudice of that claim.

22-11712

Opinion of the Court

7

and because section 1983 doesn't permit respondeat superior claims. Burse now appeals.

STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment, including on qualified immunity grounds. *Hardigree*, 992 F.3d at 1223. Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

DISCUSSION

Trooper Hartzig is entitled to qualified immunity—and therefore summary judgment as to Burse's section 1983 false arrest claim—if there was "arguable probable cause" to arrest her.³ *Kingsland v. City of Miami*, 382 F.3d 1220, 1232 (11th Cir. 2004) (citation omitted), *abrogated on other grounds by Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). Arguable probable cause exists if a reasonable officer, in the same situation and with the same knowledge as Trooper Hartzig, could have believed under the totality of the circumstances that probable cause existed to arrest Burse. *See id.* at 1232 (citations omitted).⁴

³ It is undisputed that Trooper Hartzig was acting within the scope of his discretionary authority when he arrested Burse.

⁴ Throughout the litigation, and even on appeal, the parties (and the district court) have assumed that arguable probable cause was a defense to Burse's Florida state law false arrest claim, as it is under section 1983. Because no one

Even viewing the facts in Burse’s favor, a reasonable officer in Trooper Hartzig’s position could have concluded there was probable cause to arrest Burse for a DUI. A person violates Florida’s driving under the influence statute when she drives a motor vehicle while under the influence of alcohol or certain other chemical substances “when affected to the extent that [her] normal faculties are impaired.” Fla. Stat. § 316.193(1)(a). Here, Trooper Hartzig was summoned to the scene after Burse’s bus was rear-ended while in traffic. He learned from Lieutenant Benton that Burse was confused, disheveled, unalert, and had difficulties finding paperwork and answering Lieutenant Benton’s questions. Trooper Hartzig also learned that Burse had left the intermediate school without all the children on her bus route, that the children on the bus perceived her as out of sorts, and that Burse’s supervisor thought “something wasn’t right.”

Trooper Hartzig then observed Burse with a dry mouth (the dashcam video shows her licking her lips repeatedly), watery, glassy eyes with constricted pupils, and an air of nervousness, lethargy, disorientation, and unsteadiness. During the interactions

has argued otherwise, we will make the same assumption for purposes of this appeal. *Cf. Quince v. Crosby*, 360 F.3d 1259, 1261 n.2 (11th Cir. 2004) (“This case has been litigated on the assumption by all of the parties and the district court that the pre-AEDPA law applies. For this reason . . . we decline to address whether pre-AEDPA law or the AEDPA should have applied.”); *Garwood v. Int’l Paper Co.*, 666 F.2d 217, 221 (5th Cir. Unit B 1982) (“We also assume that Florida law is the applicable substantive law in this case because both parties so argued, both in the district court and on appeal.”).

22-11712

Opinion of the Court

9

captured on video, Burse was, at times, slow to respond to Trooper Hartzig's questions—and slow to react to his instructions. Most importantly, she performed poorly on both field sobriety exercises Trooper Hartzig administered, requiring repeated instructions and struggling significantly with balance and precision. In short, these facts show Trooper Hartzig had arguable probable cause to conclude that Burse's normal faculties were impaired. The district court did not err in granting summary judgment in favor of Trooper Hartzig.

Colonel Spaulding is also entitled to summary judgment because a state official sued in his official capacity is not a "person" within the meaning of section 1983, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989), and because Trooper Hartzig's defense to Burse's state-law claim shields Colonel Spaulding from liability as well, *cf., e.g., Fernander v. Bonis*, 947 So. 2d 584, 589 (Fla. Dist. Ct. App. 2007) (affirming dismissal of state-law false arrest claim against arresting officer's employing entity because officer had valid probable cause defense); *Metro. Dade Cnty. v. Norton*, 543 So. 2d 1301, 1301–02 (Fla. Dist. Ct. App. 1989) (same). As a result, the district court also did not err in granting summary judgment in his favor.

Burse makes two arguments on appeal, but neither are availing. She argues, first, that disputed facts regarding whether she was impaired by a chemical or controlled substance—that is, by a substance triggering criminal liability under Florida Statutes section 316.193—precluded summary judgment. She says later testing

(and Trooper Smith’s opinion) confirmed that any impairment wasn’t caused by either alcohol or a controlled substance, and Trooper Hartzig had no evidence otherwise. Burse argues that the district court, viewing the evidence in her favor, should’ve ignored Trooper Hartzig’s observations, assumed Burse wasn’t impaired by a chemical or controlled substance, and thus concluded that Trooper Hartzig lacked even arguable probable cause.

Burse’s argument fails because what matters for arguable probable cause purposes are the facts and circumstances at the time of arrest—not those available to an officer only in hindsight. *Jones v. Cannon*, 174 F.3d 1271, 1283 & n.4 (11th Cir. 1999). And “[a]rguable probable cause does not require an arresting officer to prove every element of a crime.” *See Scarbrough v. Myles*, 245 F.3d 1299, 1302–03 (11th Cir. 2001). So neither Trooper Smith’s report nor Burse’s breath or urine test results—nor the fact that Trooper Hartzig lacked evidence of a specific substance causing Burse’s impairment—undermines the arguable probable cause that Burse was driving under the influence.

Burse urges us to overturn *Scarbrough* and hold that an officer can’t arrest a DUI suspect without “evidence that [she] is under the influence of alcohol, [a] controlled substance, or [a] chemical substance” (as opposed to fatigue, speech impediments, medical conditions, or other innocent explanations). But the prior panel precedent rule binds us to *Scarbrough* “unless and until [its] holding is overruled by the [c]ourt sitting en banc or by the Supreme

22-11712

Opinion of the Court

11

Court.” *See, e.g., Scott v. United States*, 890 F.3d 1239, 1257 (11th Cir. 2018).

Second, Burse argues, citing *Rankin v. Evans*, 133 F.3d 1425 (11th Cir. 1998), that Trooper Hartzig isn’t entitled to qualified immunity because clearly established law required him to investigate “readily available exonerating evidence” before arresting her. She says Trooper Hartzig should have followed up on the effects of Bactrim and Burse’s innocent explanation for her poor performance on the field sobriety exercises (a past bicycle accident), conducted another “core” field sobriety exercise (horizontal gaze nystagmus), and reached out for the opinion of a drug recognition expert.

We disagree. Even if Trooper Hartzig had investigated the effects of Bactrim, he was not required to take Burse’s word that she took nothing else on the day of the accident. *Cf. Washington v. Howard*, 25 F.4th 891, 902 (11th Cir. 2022) (noting, in context of unlawful detention claim, that officer wasn’t obligated to either believe suspect’s statement recanting photo identification of plaintiff as co-conspirator or “weigh the evidence in such a way as to conclude that probable cause did not exist”) (citing *District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018)). The same is true of Burse’s bicycle explanation—which, we note, Burse didn’t actually tell Trooper Hartzig during the duration of the dashcam video. Even if conducting a horizontal gaze nystagmus exercise or calling a drug recognition expert to the scene of a DUI investigation were considered a best practice, Burse hasn’t shown that she had a

12

Opinion of the Court

22-11712

clearly established right to either one of them—such that Trooper Hartzig did not have arguable probable cause for the arrest. *See id.* at 899 (“Probable cause does not require conclusive evidence and is not a high bar.”) (quotation omitted).

AFFIRMED.