IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No: 23-cv-01951-CNS-MDB

JACQUELINE ARMENDARIZ and CHINOOK CENTER,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS;
DANIEL SUMMEY, a detective with the Colorado Springs Police Department, in his individual capacity;
B.K. STECKLER, a detective with the Colorado Springs Police Department, in his individual capacity;
JASON S. OTERO, a sergeant with the Colorado Springs Police Department, in his individual capacity;
ROY A. DITZLER, a police officer with the Colorado Springs Police Department, in his individual capacity; and
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

DITZLER'S MOTION TO DISMISS AND
JOINDER IN SUMMEY'S/UNITED STATES' MOTION TO DISMISS

Defendant Roy A. Ditzler ("Detective Ditzler") moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss all claims asserted against him in Plaintiffs' First Amended Complaint (Doc. 12). Detective Ditzler also joins in Daniel Summey's/United States' Motion to Dismiss (Doc. 49).

Certification of Conferral Pursuant to Civ. Practice Standard 7.1B(b): Undersigned counsel certifies that she conferred with Plaintiffs' counsel, Sara Neel, concerning this motion. Plaintiffs oppose the motion.

Introduction

In this case, Plaintiffs complain of search warrants that neutral judges concluded were amply supported by probable cause and sufficiently particular and, thus, constitutional. Armendariz's claims against Detective Ditzler should be dismissed with prejudice for the reasons stated herein as well as for reasons in Daniel Summey's Motion to Dismiss (Doc. 49 at 8-19).

Argument

I. Qualified Immunity on Section 1983 Claims

A. Fourth Amendment Search and Seizure

In Claim 1 of the Amended Complaint, Armendariz asserts that Detective Ditzler violated her Fourth Amendment rights by reviewing and approving search warrants for her "devices and digital data" that "any reasonably well-trained officer" allegedly would have known failed to comply with the Fourth Amendment.[1] (Doc. 12 ¶¶ 160-161) Detective Ditzler is entitled to qualified immunity on Armendariz's Fourth Amendment claim because the warrants were valid and because it was objectively reasonable for Detective Ditzler to rely on the judges' issuance of the warrants.[2]

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[1] A number of times in the Amended Complaint Plaintiffs allege that Officer Steckler reviewed and approved Officer Summey's search warrant affidavit for Armendariz's digital devices. (*See, e.g.*, Doc. 12 at 23, 25, ¶¶ 113-115) Defendants believe such references to be an error and interpret Plaintiffs' allegations as if they assert that Detective Ditzler reviewed and approved Officer Summey's search warrant affidavit as alleged elsewhere in the Amended Complaint. (*See, e.g., id.* ¶¶ 160, 162-163, 200) Indeed, the search warrant affidavit itself contains "RAD 2145" (presumably for Roy A. Ditzler) in the footer next to "Supervisor Initials / IBM." (Doc. 49-2 at 5) "Factual allegations that contradict a properly considered document are not well-pleaded facts that the court must accept as true." *Farrell-Cooper Mining Co. v. U.S. Dep't of Interior*, 728 F.3d 1229, 1237 n.6 (10th Cir. 2013) (cleaned up).

[2] Officers first were authorized to seize Armendariz's digital devices pursuant to a search warrant for her residence. (*See* Doc. 49-1 at 18) A separate search warrant authorized them to search those devices. (Doc. 49-2)

1. Search Warrant Validity

A search warrant is valid if it meets three requirements: it must (1) have been "issued by a neutral, disinterested" judicial officer; (2) be based on " 'probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense' "; and (3) "particularly describe the things to be seized, as well as the place to be searched." *Eckert v. Dougherty*, 658 F. App'x 401, 406 (10th Cir. 2016).

As to the first requirement, the warrants were issued by El Paso County, Colorado, judges. (*See* Docs. 49-1, 49-2)[3] Armendariz does not allege that the judges were not neutral and disinterested. Thus, the first requirement is satisfied.

As to the second requirement, Armendariz alleges that the search warrants "exceeded the scope of probable cause established in the affidavit" because they "failed to limit the search to evidence of a specific crime" and "affirmatively rejected a date-range limitation." (Doc. 12 ¶ 154) The Tenth Circuit described the legal standard for evaluating a search warrant as follows:

> Where a warrant is obtained, a reviewing court determines the sufficiency of the warrant by examining the affidavit supporting it. The court determines the sufficiency of the affidavit "by looking at the totality of the circumstances and simply ensuring that the magistrate had a substantial basis for concluding that probable cause existed." Probable cause exists when "there is a fair probability that the contraband or evidence of a crime will be found in a particular place." The "affidavit supporting the search warrant need not contain direct evidence or personal knowledge that the items sought are located at the place to be searched." Instead, the magistrate judge may draw reasonable inferences from the information in the affidavit supporting the warrant.

[3] Although Armendariz did not attach the Digital Device Warrant to the Amended Complaint, it is central to her claims and, therefore, may be considered by the Court without converting this Motion to a motion for summary judgment. *See Walker v. Park Cnty. Sheriff's Off.*, No. 21-1119, 2022 WL 538121, at *4 n.6 (10th Cir. Feb. 23, 2022); *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

United States v. Shelton, 817 F. App'x 629, 633–34 (10th Cir. 2020) (internal citations omitted).

In this case, Officer Summey's affidavit demonstrated that there was a fair probability that evidence of a crime would be found in the data to be seized from Armendariz's digital devices. First, the affidavit itself was twenty-four pages long, with photos and screenshots and narratives of the basis for suspecting Armendariz of attempted assault on a police officer. (Doc. 49-2) Contrary to Armendariz's allegations, the warrant identified the crime for which the evidence was sought: "a violent act against a police officer"—namely, Colo. Rev. Stat. § "18-2-101 Criminal Attempt – Second Degree Assault – Class 5 Felony." (*Id.* at 18, 29)

Officer Summey testified to his experience that people like Armendariz share information concerning the commission of such crimes "with others through messaging applications, emails, or texts in order to take credit for their actions and gain standing or notoriety in such groups." (*Id.* at 20) Accordingly, the Digital Device Warrant sought photos, videos, messages, emails, and location data from her digital devices from June 5, 2021 through August 7, 2021 "that are determined to be relevant to this investigation. This time period would allow for any planning leading up to the crime, the period when the crime took place, and the subsequent taking of credit for committing a violent act against a police officer." (*Id.* at 29) Armendariz takes issue with Summey's "training or experience" (Doc. 12 ¶ 105), but the Tenth Circuit recognizes such training and experience as valid bases for upholding search warrants for digital devices. *See United States v. Burgess*, 576 F.3d 1078, 1091–92 (10th Cir. 2009) (search warrant affidavit which stated that "Based upon training and experience," the affiant "knows that persons involved in trafficking or the use of narcotics often keep photographs of coconspirators or photographs of illegal narcotics in their vehicle" was not overbroad and demonstrated probable cause to search computers and hard drives).

In addition, although the Tenth Circuit has "declined to require a search protocol for computer searches," here, the Digital Device Warrant went above and beyond by specifying search terms to be run on Armendariz's digital devices. (*Id.*) *United States v. Russian,* 848 F.3d 1239, 1245 n.1 (10th Cir. 2017). The terms were designed to uncover evidence of the intention to commit and taking credit for committing acts of violence against police officers. (Doc. 49-2 at 20-29) From these facts, Detective Ditzler—and the judges—reasonably could believe that evidence of Armendariz's intent to commit and commission of the crime of attempted assault on a police officer existed in her digital devices. The judge's finding that probable cause did exist is entitled to "great deference." *Poolaw v. Marcantel,* 565 F.3d 721, 728 (10th Cir. 2009).

Finally, as to the third requirement, the search warrants and incorporated Affidavits were sufficiently particular. A warrant that " 'enables the searcher to reasonably ascertain and identify the things authorized to be seized' " satisfies the particularity requirement. *United States v. Pulliam*, 748 F.3d 967, 972 (10th Cir. 2014) (citation omitted). Furthermore, " 'a warrant that describes the items to be seized in broad or generic terms may be valid when the description is as specific as the circumstances and the nature of the activity under investigation permit.' " *Id.* (citation omitted). Search warrants for electronic devices must "affirmatively limit the search to evidence of specific ... crimes or specific types of material." *Palms,* 21 F.4th at 698-99.

Here, the search warrant was sufficiently particular because it limited the search of Armendariz's digital devices to specific types of material—"photos, videos, messages … emails, and location data, for the time period of 6/5/2021 through 8/7/2021 that are determined to be relevant to this investigation" into Armendariz's commission of attempted assault on a police officer. (Doc. 49-2 at 28-29) It further specified key word search terms that "would be relevant to the investigation regardless of the time period in which they occurred." (*Id.* at 29) The warrant was

"as specific as the circumstances and the nature of the activity under investigation permit[ted]" and, thus, was valid. *Pulliam*, 748 F.3d at 972.

Because the allegations of the Amended Complaint fail to establish a violation of the Fourth Amendment, Detective Ditzler is entitled to qualified immunity on Armendariz's Fourth Amendment claim.

2. Objective Reasonableness and No Clearly Established Law

Detective Ditzler also is entitled to qualified immunity on Armendariz's Fourth Amendment claim against him because Armendariz fails to allege that Detective Ditzler's reliance on the warrant was objectively unreasonable. *See Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012). As explained by the Supreme Court, "the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.'" *Id.* (citation omitted) Few exceptions to this rule exist, and the "threshold" for establishing them "is a high one, and it should be. [That is because] '[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination' because '[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment.' " *Id.* at 547. *See also United States v. Augustine*, 742 F.3d 1258, 1262 (10th Cir. 2014) (listing the exceptions to the presumption of objective reasonableness of an officer's reliance on a court-issued search warrant). Here, Armendariz has not alleged that any of the exceptions to the rule exist. (Doc. 12, ¶¶ 95-119) Thus, Detective Ditzler is entitled to qualified immunity on Armendariz's claim under 42 U.S.C. § 1983 that he violated her Fourth Amendment rights.

In addition, Armendariz will be unable to meet her burden to show that her clearly established Fourth Amendment rights were violated under these circumstances. *See, e.g.*, *United States v. Palms*, 21 F.4th 689, 699–700 (10th Cir. 2021); *United States v. Sadlowski*, 948 F.3d 1200, 1204–05 (10th Cir. 2020); *United States v. Pulliam*, 748 F.3d 967, 971–72 (10th Cir. 2014); *United States v. Christie*, 717 F.3d 1156, 1165–66 (10th Cir. 2013); *United States v. Christie*, 717 F.3d 1156, 1165–66 (10th Cir. 2013).

B. First Amendment Retaliation

1. No constitutional violation

Armendariz baldly alleges that the "search and seizure of Ms. Armendariz's devices and digital data was … retaliatory," in violation of the First Amendment. (Doc. 12 ¶ 151) To state a First Amendment retaliation claim, Armendariz must allege: (1) that she "was engaged in constitutionally protected activity"; (2) defendants' "actions caused [her] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity"; and (3) defendants' "adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1203 (10th Cir. 2007). In addition, "a plaintiff claiming that a search warrant was executed in retaliation for a protected activity is required to show a lack of probable cause as an element of that claim." *Chavez v. City of Albuquerque*, No. 13cv00557 WJ/SMV, 2014 WL 12796875, at *3 (D.N.M. Apr. 14, 2014), *citing Hartman v. Moore*, 547 U.S. 265-66 (2006).

Here, Armendariz wholly fails to allege facts that, if true, plausibly show that her exercise of constitutionally protected conduct substantially motivated Detective Ditzler to review and approve the search warrant affidavit for Armendariz's digital devices. Indeed, Armendariz does not even allege in conclusory fashion that Detective Ditzler was substantially motivated by

Armendariz's expressive activity; she alleges that his only involvement was to review and approve Summey's search warrant affidavit. (Doc. 12 ¶ 160)

In addition, as discussed herein, the search warrant was sought to investigate Armendariz's attempted assault on a police officer that already had occurred. By the time the search warrant for Armendariz's digital devices was sought, the criminal prosecution of Armendariz already had been instituted. (Doc. 12 ¶¶ 6, 43-44, 87) The search warrant wasn't sought to retaliate against Armendariz but rather to collect evidence probative of the attempted assault charge already pending. (Doc. 49-2 at 28) Armendariz fails to allege any facts that support the notion that Armendariz's protected speech activities substantially motivated Detective Ditzler to approve the warrant.

Furthermore, as discussed in Part I.A.1, Armendariz fails to allege that the search warrant was unsupported by probable cause. In sum, Armendariz fails to state a claim for a violation of her First Amendment rights.

2. No clearly established law

Detective Ditzler also is entitled to qualified immunity on Armendariz's First Amendment retaliation claim because it was not clearly established in August 2021 that merely reviewing and approving a search warrant affidavit could give rise to a First Amendment retaliation claim or that the search warrant for Armendariz's digital devices violated clearly established law. Armendariz will be unable to meet her burden to show that her clearly established First Amendment rights were violated under these circumstances.

Again, Detective Ditzler specifically joins in the arguments made by Summey in his Motion to Dismiss Armendariz's Fourth and First Amendment claims, which are equally

applicable to him, and demonstrate that he neither violated Armendariz's constitutional rights nor violated clearly established law. (*See* Doc. 49 at 8-19)

II. Colorado Constitution Claims

In Claim 4 of the Amended Complaint, Armendariz asserts unlawful search and protected speech violation claims against Officer Ditzler under the Colorado Constitution. For the same reasons that Armendariz fails to state federal constitutional violation claims against Officer Ditzler, she fails to allege the violation of her rights under the Colorado Constitution. (*See supra* Parts I.A.1 and I.B.1)

Conclusion

All of Plaintiffs' claims against Officer Ditzler should be dismissed.

Respectfully submitted this 20th day of November, 2023.

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 20th day of November, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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