

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 4, 2021*
Decided August 5, 2021

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 20-3049

AL HOLIFIELD,
Plaintiff-Appellant,

v.

GERALD KULWICH, et al.,
Defendants-Appellees.

Appeal from the United States District
Court for the Eastern District of Wisconsin.

No. 18-cv-0801-bhl

Brett H. Ludwig,
Judge.

ORDER

Several police officers approached a car parked outside Al Holifield's residence in Milwaukee, Wisconsin. Holifield was sitting inside with another man, about to get out. Upon smelling and seeing marijuana, the officers arrested Holifield and, when they searched him, found multiple plastic bags containing crack cocaine. Then, after determining that Holifield was on extended supervision for drug convictions, the officers searched his residence without a warrant. Holifield sued the officers under

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

42 U.S.C. § 1983, asserting that they arrested him and searched him and his home in violation of his Fourth Amendment rights and with a retaliatory motive. The district court entered summary judgment for the officers. Because a factual dispute remains over whether the officers conducted the search of Holifield's residence in a reasonable manner, we vacate the decision on that issue. Otherwise, we affirm.

One evening, Holifield and his friend, Brian Avery, were parked outside of Holifield's residence. Several officers approached the car, which was parked more than two feet away from the curb, in violation of a local ordinance and state law, WIS. STAT. § 346.54(1)(d). As they approached, they smelled marijuana and observed a "blunt" on the center console. Avery, who was in the driver's seat, informed the officers that the marijuana was his and that he had smoked it in the car earlier that day. One officer asked Holifield to get out of the car, searched him, and discovered a plastic bag containing 22 smaller plastic bags filled with a white chunky substance that appeared to be crack cocaine. Meanwhile, the other officers searched the vehicle and found a plastic bag containing what appeared to be marijuana. The officers arrested Holifield and requested permission to search his home, but he refused.

The officers then conducted a warrant check and discovered that Holifield was on extended supervision for various drug crimes. When officers have reasonable suspicion that a person on extended supervision has committed a crime or a violation of a condition of release, Wisconsin law allows a warrantless search (conducted in a reasonable manner) of the person's home. WIS. STAT. § 302.113(7r). Using Holifield's keys to enter, officers searched Holifield's home, but they found nothing illegal. According to Holifield's verified complaint, the officers damaged property during the search and then left the door unlocked, causing the home to be burglarized. As a result, Holifield asserts, he was evicted. (One officer attested that they conducted a reasonable search of clothing, paperwork, and furniture in the residence, did not cause any damage to Holifield's property, and locked the residence when they left.) Based on the drugs found in his pockets during the arrest, Holifield was convicted of possessing cocaine with intent to deliver it. WIS. STAT. § 961.41(1m)(cm)1g.

Holifield sued the police officers involved, alleging that they unlawfully arrested and searched him and then conducted an unlawful search of his home. They targeted him, he went on, because in 2014 he had filed a petition for a writ of habeas corpus implicating them in his allegedly wrongful conviction, and for refusing to be an informant for a neighborhood task force they belonged to. At screening, the district court allowed Holifield to proceed on a First Amendment retaliation claim and a Fourth

Amendment claim regarding the search of his home. But his claim that the officers lacked probable cause to approach the car and arrest him was barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), the court found, because a finding for Holifield would undermine the validity of his conviction resulting from the incident. And his claim that the officers lacked probable cause to search him failed because he admitted that there was a smell of marijuana, a blunt, and a bag of marijuana in the car. (Marijuana possession is illegal in Wisconsin.)

After discovery, the defendants moved for summary judgment, and Holifield filed a response that also served as a cross-motion for summary judgment. The defendants objected to Holifield's submission on the ground that it did not comply with the court's local rules. But the court stated that it would overlook Holifield's noncompliance because he had submitted a detailed brief that was sworn before a notary public and had invoked 28 U.S.C. § 1746 in his complaint, converting it into an affidavit for the purposes of summary judgment. *Beal v. Beller*, 847 F.3d 897, 901 (7th Cir. 2017). The court thus decided it would "consider the information contained in Holifield's submissions where appropriate in deciding the defendants' motion."

The court granted the defendants' motion for summary judgment and denied Holifield's. Holifield's retaliation claim failed as a matter of law, the court explained, because the Supreme Court's recent decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), required him to "plead and prove the absence of probable cause for the arrest" to prevail. *Id.* at 1724. And the undisputed facts showed that the officers had probable cause to arrest Holifield based on the marijuana. As for the claim that the search of his home was unreasonable, the court determined that Wisconsin law authorized the search: Holifield was on extended supervision for drug crimes when officers found what appeared to be crack cocaine on his person. Holifield failed to create a fact issue regarding the reasonableness with which the officers conducted the search, the court went on, because he pointed only to the allegations in his complaint, which were conclusory and not based on his personal knowledge (because he was not present during the search). On the other hand, one of the defendant officers provided an affidavit, which, "[w]hile not terribly detailed, [] at least offer[ed] first-hand testimony that no property was damaged and the house was locked when the officers left."

On appeal, Holifield first argues that the police officers targeted him out of retaliatory animus, in violation of the First Amendment, when they stopped and searched him. As evidence, he points to the fact that the officers proceeded even after Avery asserted ownership over the marijuana in the car. But the district court got it

right: the existence of probable cause for his arrest precludes his retaliatory arrest claim. *Id.* Holifield does not contest that the vehicle contained and smelled of marijuana when he was arrested; he asserts only that it belonged to Avery. But the strong smell of marijuana and the presence of the blunt are “sufficient to warrant a prudent person, or one of reasonable caution” to believe that both Avery and Holifield had committed the offense of marijuana possession. *United States v. Paige*, 870 F.3d 693, 699–700 (7th Cir. 2017) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)). Holifield’s First Amendment claim thus fails.

Holifield also challenges his arrest and the attendant search of his person as violations of the Fourth Amendment. But the existence of probable cause is also an absolute defense to claims of unreasonable seizure, and a valid custodial arrest allows a full search of the person. *United States v. Robinson*, 414 U.S. 218, 235 (1973). Therefore, the court appropriately dismissed the unlawful search and seizure claims at screening. *See Paige*, 870 F.3d at 700.

Next, Holifield argues that there is an issue of fact regarding whether the defendants conducted the search of his residence in a reasonable manner. We agree. Wisconsin law authorizes a warrantless search of the home of a person on extended supervision where there is reasonable suspicion that the person has committed a crime. WIS. STAT. § 302.113(7r). Although the search was lawful, Holifield can still show a violation of the federal Constitution—the only legal theory he advanced at the summary judgment stage—because “[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment.” *United States v. Ramirez*, 523 U.S. 65, 71 (1998); *Heft v. Moore*, 351 F.3d 278, 282 (7th Cir. 2003) (claims for property damage during the execution of valid search are evaluated pursuant to the “general touchstone of reasonableness which governs Fourth Amendment analysis”) (citation omitted).

The district court, in evaluating the reasonableness of the search, explained that Holifield relied only upon the “conclusory and unattributed allegations” in his complaint to show that the officers destroyed property during the search, left the home unlocked and in shambles, and caused him to be evicted after burglars ransacked the place. But as Holifield argues on appeal, he also supported his version of events with “affidavits from ... Zanesha Houston and Al Simmons”—his girlfriend and his father, who also lived in the home, which he attached to his summary judgment submission. Both witnesses attested that when they returned home (Simmons returned shortly after the search and Houston sometime thereafter), they discovered that the police officers

had caused substantial damage to their residence and left the door unlocked for it to be burglarized, resulting in their eviction. True, one of the police officers who conducted the search swore to an alternate version of events: she said that they caused no damage to Holifield's personal property and that she secured the home with Holifield's keys when they left. But the evidence overlooked by the district court creates a genuine dispute about what occurred during the search that cannot be resolved at summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see Miller v. Gonzalez*, 761 F.3d 822, 827 (7th Cir. 2014) ("[O]ur job when assessing a summary judgment motion is not to weigh evidence, make credibility determinations, resolve factual disputes and swearing contests, or decide which inferences to draw from the facts.").

Because a material question of fact remains about whether the officers caused excessive or unnecessary damage while conducting the search of Holifield's residence, we VACATE the judgment on that claim and REMAND for further proceedings. Otherwise, we AFFIRM.