

NONPRECEDENTIAL DISPOSITION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 March 22, 2023

Decided April 10, 2023*

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2582

TONY A. BERGER,
Plaintiff-Appellant,

v.

WOOD COUNTY, et al.,
Defendants-Appellees.

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

No. 21-cv-454-wmc

William M. Conley,
Judge.

ORDER

* 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). Berger's complaint names the "Wood County Sheriff's Department" as a defendant, but that is not a suable entity, so we have adjusted the caption accordingly. *See Whiting v. Marathon Cnty. Sheriff's Dep't*, 382 F.3d 700, 704 (7th Cir. 2004).

Wood County deputy sheriffs arrested Tony Berger after a 911 call from his girlfriend reporting that he was armed and threatening people. After the State dropped the case against him, Berger sued those involved in his arrest and prosecution, alleging that they had violated his Fourth, Sixth, and Fourteenth Amendment rights. The district court entered summary judgment for the defendants. We affirm.

We construe the facts and draw all reasonable inferences in Berger's favor. *See Indianapolis Airport Auth. v. Travelers Prop. Cas. Co.*, 849 F.3d 355, 361 (7th Cir. 2017). And we may consider "irrefutable facts" preserved by the body-camera footage of this incident. *See Dockery v. Blackburn*, 911 F.3d 458, 461 (7th Cir. 2018).

In May 2020, Wood County sheriff's deputies responded to a 911 call from Berger's then-girlfriend, who told them that she and her son were hiding outside after Berger, who was armed with a gun, had threatened to harm two of her acquaintances in a nearby town. She also stated that Berger had threatened her and her son. Law enforcement arrived and located Berger's girlfriend and son outside; she told them that Berger had choked her. Police officers then established a safety perimeter around Berger's property. Deputy Brandon Christianson spoke with Berger by cellphone and asked to meet with Berger. Berger said he had been drinking and was in bed, but shortly thereafter walked outside with his hands up, inviting police to "come on over."

After searching Berger for weapons, Christianson spoke with him outside. Berger admitted that he was angry with two people who had threatened him: he had told them by phone that he was going to "kick" their "ass[es]." Berger stated that he had gone to his truck but decided not to leave because he had been drinking. He denied bringing a gun to the truck but confirmed that he had guns in the house. Berger also told Christianson that his girlfriend, who had lived with him for five years, had kicked him in the face when he tried to kiss her, so he had "shoved her back on the couch."

Berger then invited the deputies inside and offered to show them his guns, but Christianson said they should keep talking in the living room. Berger again stated that he "slam[med]" his girlfriend "back against the pillow," and he admitted that he told her that if the people he was angry with came to their home, he would "put a bullet in them." But he denied choking his girlfriend, stating he had "pushed" her head back.

Christianson then spoke with Berger's girlfriend, who told him that during an argument Berger had choked her hard enough that she could not breathe and thought

she was going to pass out. She also said that while Berger was in the bedroom, she had heard him threatening her acquaintances on the phone and loading a gun, which he later put down in the kitchen.

Deputy Eric Marten spoke separately with her son, who stated that when he came to investigate Berger yelling at his mother, he saw Berger choking her on the ground; when he asked Berger what he was doing, Berger backed off. He said he then heard Berger go into the back bedroom and threaten to shoot the acquaintances and saw Berger leave the house with a pistol and start his truck.

Christianson told Berger he was arresting him for strangulation and being armed while intoxicated. Christianson then asked Berger's girlfriend if she had access to Berger's guns. She replied, "we can go look," and walked to the back bedroom with officers and her son, who identified the pistol in Berger's closet and magazines on the dresser. Christianson took the pistol, a holster, and two magazines. Berger's girlfriend was present the entire time and did not object to Christianson's taking the items.

The State charged Berger with strangulation and suffocation, disorderly conduct, and intoxicated use of a firearm, each with a domestic abuse enhancer. *See* WIS. STAT. §§ 940.235(1), 968.075, 941.20(1)(b), 947.01. At Berger's preliminary hearing, the circuit court found probable cause to believe that he had committed a felony, and he was bound over for further proceedings.

The charges were eventually dismissed after Berger's girlfriend declined to cooperate with the prosecution. Berger also submitted allegedly exculpatory documents: an email and victim impact statement from his girlfriend denying that she had consented to any search or seizure, and an affidavit from her brother asserting that she and her son agreed to lie about the choking to have Berger arrested.

Berger then brought this suit under 42 U.S.C. § 1983 against the Wood County Sheriff's Department, deputies Christianson and Marten, the prosecutor, and the district attorney's office. He alleged that they violated his Fourth Amendment rights by unlawfully detaining and arresting him, searching his home, and taking his gun; his Sixth Amendment right to a speedy trial; and his Fourteenth Amendment due-process rights by maliciously prosecuting him.

The district court dismissed the claims against the prosecutor as barred by absolute prosecutorial immunity, *see Imbler v. Pachtman*, 424 U.S. 409, 427 (1976), and against the district attorney's office because it is a division of the state, *see* WIS. STAT. § 978.01(1); *Ameritech Corp. v. McCann*, 403 F.3d 908, 910 (7th Cir. 2005), and thus not a suable entity under § 1983, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989).

The parties cross-moved for summary judgment, and the district court entered judgment for the defendants. First, the court concluded that the Sheriff's Department was not a suable entity, and Berger's allegations did not support a municipal-liability claim against the county. Next, the court concluded that the deputies had probable cause to arrest Berger. Finally, the court determined the search of the home and seizure of the gun were valid because Berger's girlfriend consented to them. Berger appeals.

As a threshold matter, the defendants argue that Berger's brief does not comply with Federal Rule of Appellate Procedure 28(a) because it does not cite authorities or make more than "a generalized assertion of error." *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001). While Berger's brief is cursory, we prefer to decide cases on the merits and can do so here. *See Atkins v. Gilbert*, 52 F.4th 359, 361 (7th Cir. 2022).

On appeal, Berger re-argues that there was no probable cause to arrest him and that the search of his home and seizure of his gun were unlawful. We review *de novo* the district court's entry of summary judgment. *Indianapolis Airport Auth.*, 849 F.3d at 361.

Summary judgment was appropriate on Berger's claims against the deputies because Berger's arrest was supported by probable cause, an absolute defense to false arrest and false imprisonment claims. *See Abbott v. Sangamon County*, 705 F.3d 706, 713–14 (7th Cir. 2013). Probable cause exists if, considering the totality of the circumstances "at the time of the arrest," a reasonable officer would have believed that Berger had committed a crime. *See id.* at 714 (emphasis added). Thus, what happened *after* the arrest—including Berger's girlfriend's recantation and her brother's letter—is irrelevant to our review. *See Wheeler v. Lawson*, 539 F.3d 629, 637 (7th Cir. 2008).

Berger was arrested for strangulation and suffocation, which occurs when someone "intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck" of another. WIS. STAT. § 940.235(1). Berger's girlfriend told Christianson that when Berger choked her, she could not breathe, and

she thought she was going to pass out. Her son independently stated that he witnessed the choking. A report from one “reasonably credible witness or victim” can establish probable cause. *Matthews v. City of East St. Louis*, 675 F.3d 703, 706 (7th Cir. 2012). The deputies arresting Berger had a witness and a victim and reasonably believed they were telling the truth, especially as Berger himself corroborated many of their statements. No further investigation was required at this stage. *See id.* at 707. Berger argues that the district court wrongly relied on hearsay to support probable cause, but it relied on the statements to show the effect they had on the deputies, not for their truth. *See Woods v. City of Chicago*, 234 F.3d 979, 986 (7th Cir. 2000). Because there was probable cause to arrest Berger for strangulation and suffocation, we need not consider the other offenses. *See, e.g., Lyberger v. Snider*, 42 F.4th 807, 812–13 (7th Cir. 2022).

We similarly agree with the district court that the search of Berger’s home and seizure of his gun were valid under the Fourth Amendment. A third party’s voluntary consent to a search or seizure eliminates the need for a warrant, as long as the party has authority to consent. *See United States v. Ryerson*, 545 F.3d 483, 487 (7th Cir. 2008); *United States v. Vines*, 9 F.4th 500, 509 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 385 (2021). Berger does not argue that his girlfriend—who had lived in the house for five years at the time of the arrest and had joint access to the property—lacked authority to consent to the search or seizure. *See, e.g., Ryerson*, 545 F.3d at 487 (third party who lived in home with child for ten months and kept belongings there had authority to consent). And her statement to officers that, “we can go look,” followed by her escorting them into the bedroom and watching without objection while they searched, established that the consent was voluntary. *See United States v. Villegas*, 388 F.3d 317, 324–25 (7th Cir. 2004).

Summary judgment was also appropriate on Berger’s claims against the Department. In the district court, Berger did not articulate a basis for imposing municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Indeed, he did not identify an unconstitutional policy or custom or provide “evidence of a prior pattern of similar constitutional violations.” *See Dean v. Wexford Health Sources, Inc.*, 18 F.4th 214, 234 (7th Cir. 2021). Although Berger now seeks to present evidence showing an alleged pattern of corruption, he may not do so for the first time on appeal. *See Henderson v. Wilkie*, 966 F.3d 530, 539 (7th Cir. 2020).

Finally, to the extent Berger attempts to reassert claims about his prosecution, the district court properly ruled that prosecutorial immunity blocked those claims against the prosecutor. *See Imbler*, 424 U.S. at 427.

We have considered Berger's other arguments, but none merits discussion.

AFFIRMED