

NONPRECEDENTIAL DISPOSITION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 June 14, 2024*

Decided June 21, 2024

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 23-3168

JOHN LUGO,
Plaintiff-Appellant,

Appeal from the United States District
Court for the Central District of Illinois.

v.

No. 23-cv-01061

ALAN BURTON, et al.,
Defendants-Appellees.

Michael M. Mihm,
Judge.

ORDER

John Lugo sued Woodford County, Illinois, the Woodford County Sheriff's Office, unknown supervisors from the Sheriff's Office, and Deputy Alan Burton under 42 U.S.C. § 1983, alleging that they violated his constitutional rights when Burton responded to a dispute between Lugo and his neighbors about tree trimming. Because

* We have agreed to decide this 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).

on this record no reasonable jury could find that the defendants violated Lugo's constitutional rights, we affirm the judgment.

We construe the record in favor of Lugo, the party opposing summary judgment. *See Arce v. Wexford Health Sources Inc.*, 75 F.4th 673, 678 (7th Cir. 2023). Lugo and his next-door neighbors, Scott and Alena Sturm, had a longstanding feud, the details of which are not relevant to this appeal. *See Lugo v. Sturm*, 2024 IL App (4th) 230279-U. The events underlying this case took place in 2023, when the Sturms hired a tree trimmer to remove branches from a tree on Lugo's property that hung over the Sturms' property. The tree trimmer, who was aware of the feud, requested law enforcement presence at the Sturms' property on the morning of the trimming.

Burton, a deputy with the Woodford County Sheriff's Office, responded to the request. A recording device on Burton's police car captured his conversations with Lugo, the Sturms, and the tree trimmers. Burton first spoke with the Sturms and the tree trimmer, who informed Burton that Lugo did not want the tree trimmed. Burton told them that they could trim branches that hung over the Sturms' property line, but they would need Lugo's permission to do any work on his property. After Scott Sturm told Burton that Lugo had a pending petition for a protective order against him, Burton offered to discuss the situation with Lugo, who was standing outside of his home.

Burton then spoke to Lugo in his driveway. After Burton explained that the tree trimmer requested Burton's presence, Lugo stated that he would not give the tree trimmer permission to enter his property. Lugo also explained that the precise location of the property line that divided his and the Sturms' properties was an issue in a pending lawsuit. Burton told Lugo that the tree trimmer wanted to anchor himself to the tree on Lugo's property to safely trim the branches that extended over the Sturms' property. Lugo rebuked that request, and Burton acknowledged that the trimmer would not come onto Lugo's property. Burton then returned to the Sturms' property, where he told the Sturms and the tree trimmer that Lugo did not want anyone to enter his property and that doing so would be trespassing. In response, the tree trimmer told Burton that he intended to cut the branches overhanging the Sturms' property without anchoring himself to the tree on Lugo's property, although doing so would be less safe.

While Burton was talking to the tree trimmer, Lugo got into his car and parked it at the edge of the road in front of the Sturms' property to film the Sturms and the tree trimmer. Burton told Lugo that he could record the tree being trimmed from his own property or further up the street, but he could not remain directly in front of the Sturms' property. Burton explained that Lugo had a pending protective order against Scott

Sturm and told Lugo to move several times. Lugo asked Burton whether Burton was giving him a “direct order” to move, and Burton confirmed that he was. Lugo initially resisted Burton’s request, stating that he wanted to watch his tree and that he was on public property. Finally, Burton raised his voice and yelled at Lugo to move; Lugo complied. Before leaving, Burton explained to Lugo that allowing him to park right in front of the Sturms’ property might provoke a confrontation.

Burton returned to speak with Lugo after Lugo called the Sheriff’s Office several times. The tree trimmer was still on the Sturms’ property, and a video from Burton’s car briefly shows the tree trimmer hanging from the tree while working on the Sturms’ side of the property line. The tree trimmer cut at least one branch from the tree, which landed on the Sturms’ property, while Burton was present at the scene. Lugo and Burton argued about the earlier encounter, and Lugo reiterated his desire to park in front of the Sturms’ residence to film the tree trimming. Lugo also told Burton that the tree trimmer was “on [his] tree.” Lugo then asked whether Burton would arrest him if he parked in the same spot again, and Burton said that he would arrest Lugo for obstruction. Burton explained that Lugo was “playing a game” and seeking to provoke a confrontation with the Sturms. After several minutes, Burton left the scene.

Lugo then sued Woodford County, the Woodford County Sheriff’s Office, Burton in his individual and official capacity, and unknown Sheriff’s Office supervisors in their individual and official capacities. *See* 42 U.S.C. § 1983. He alleged that Burton “facilitated an unlawful trespass” onto his property and threatened to arrest him in violation of his due process rights and his right to be free from unreasonable searches and seizures under the Fourth, Fifth, and Fourteenth Amendments. He also alleged that the County, Sheriff’s Office, and unknown supervisors had a custom, policy, or practice of deliberate indifference to these constitutional violations, *see Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978), and they failed to train Burton.

Burton and the Sheriff’s Office moved for summary judgment. The Sheriff’s Office also filed a motion to dismiss, which Woodford County joined. The district court entered summary judgment for all of the defendants and struck the motion to dismiss as moot. The court determined that there was no evidence that Burton seized Lugo’s person or property or that Burton violated Lugo’s procedural or substantive due process rights. And because there was no underlying constitutional violation, the court ruled that Lugo’s *Monell* claim against the County, Sheriff’s Office, and the unknown supervisors could not prevail. The court also dismissed without prejudice a state-law

claim against Burton. We review the court's entry of summary judgment de novo. *Arce*, 75 F.4th at 678.

On appeal, Lugo first argues that Burton "facilitated a trespass" when Burton, upon returning to the scene, failed to stop the tree trimmer from crossing onto Lugo's property. To the extent that Lugo argues that Burton unreasonably seized his property in violation of the Fourth Amendment, Lugo must show that there was "some meaningful interference with [his] possessory interests in that property." *Pepper v. Village of Oak Park*, 430 F.3d 805, 809 (7th Cir. 2005) (quoting *Soldal v. Cook County*, 506 U.S. 56, 67 (1992)). But the Fourth Amendment is inapplicable to a seizure "effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official." *United States v. Jacobsen*, 466 U.S. 109, 113–14 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

Even if we determined that the tree on Lugo's property is of the type protected by the Fourth Amendment and that the tree was seized when its branches were cut, *see Pepper*, 430 F.3d at 809 (property seizure must be of type protected by Fourth Amendment), Lugo's argument cannot prevail because he failed to present any evidence that Burton was personally responsible for the seizure, *see Wilson v. Warren County*, 830 F.3d 464, 469 (7th Cir. 2016). During the first encounter, Burton instructed the tree trimmer not to trespass onto Lugo's property, so he was not personally responsible for any conduct that occurred before he returned to the scene. When Burton returned for approximately five minutes to speak with Lugo, no evidence showed that Burton actively participated in seizing Lugo's property.

Lugo disagrees, arguing that he alerted Burton to the ongoing trespass, and a branch fell from the tree during Burton's second visit to the property. But the tree trimmer previously told Burton that he intended to cut only the branches overhanging the Sturms' property without trespassing onto Lugo's property. And when Burton returned to the scene, the tree trimmer was removing a branch while hanging from the tree on the Sturms' side of the property line. Even if this evidence suggests that Burton should have been aware that the tree trimmers were seizing Lugo's property, mere negligence is insufficient to show that the seizure occurred with Burton's knowledge and consent. *See id.*

This leads to Lugo's next argument that Burton violated his constitutional rights by failing to take additional investigative or enforcement action to stop the trespass. But Lugo's argument is unavailing because he "does not have a constitutional right to have

the police investigate his case at all, still less to do so to his level of satisfaction.” See *Rossi v. City of Chicago*, 790 F.3d 729, 735 (7th Cir. 2015). Substantive due process “does not require a state to protect citizens from private acts unless the state itself creates the danger.” *Wilson*, 830 F.3d at 469 (citing *King ex rel. King v. E. St. Louis Sch. Dist.* 189, 496 F.3d 812, 817 (7th Cir. 2007)). No reasonable jury could find that Burton created the danger that Lugo would be deprived of his property—Burton specifically warned the tree trimmer not to enter Lugo’s property without Lugo’s permission lest he commit trespass.

Lugo next argues that Burton unreasonably seized his person in violation of the Fourth Amendment. Lugo argues that Burton seized him twice: first, when Burton ordered Lugo to move after Lugo parked in front of the Sturms’ home; and second, when Burton returned to the scene and threatened to arrest Lugo if he returned to that spot. To prevail on his Fourth Amendment claim, Lugo must show that a seizure of his person occurred, and the seizure was unreasonable. *Hess v. Garcia*, 72 F.4th 753, 761 (7th Cir. 2023). In a situation like Lugo’s where a person has no desire to leave the scene of an encounter with police, “the appropriate inquiry is whether a reasonable person would feel free to decline the officer’s request or otherwise terminate the encounter.” *Kernats v. O’Sullivan*, 35 F.3d 1171, 1177 (7th Cir. 1994) (quoting *Florida v. Bostick*, 501 U.S. 429, 435–36 (1991)). Evidence of a seizure includes “the threatening presence of several officers, the display of a weapon ... , physical touching of the person ... , or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). According to Lugo, Burton’s order to move during the first encounter and threat of arrest during the second encounter are evidence of a seizure.

Lugo’s claim that he was unreasonably seized during the first encounter cannot prevail because Burton did not seize Lugo, and, even if he did, Burton’s actions were reasonable. Burton did raise his voice and issue a “direct order” to Lugo during the first encounter, but Burton was the sole officer at the scene, did not display a weapon, and did not touch Lugo. See *id.* After Lugo parked, Burton simply ordered Lugo to leave the area directly in front of the Sturms’ home, and he did. We have previously held that such an “expulsion” is not a seizure absent the use of force, threats, or other indicia of coercion. See *Hamilton v. Village of Oak Lawn*, 735 F.3d 967, 971–72 (7th Cir. 2013). Further, we repeatedly have said that an officer who separates parties to a domestic disturbance by ordering one party to leave acted reasonably under the “community caretaking function” regardless of whether his actions constituted a seizure. See *Dix v. Edelman Fin. Servs., LLC*, 978 F.3d 507, 517 (7th Cir. 2020) (quoting *Lunini v. Grayeb*,

184 F. App'x 559, 562 (7th Cir. 2006)). Given Burton's knowledge of the feud between the parties (as supported by Lugo's and the Sturms' statements and the pending protective order filed by Lugo), it was reasonable for Burton to order Lugo to move away from the Sturms' property to avoid the risk that the situation would escalate.

As for the second encounter, Burton did not seize Lugo. Burton told Lugo that he would be arrested if he returned to a specific location in front of the Sturms' house. And such an order, which sought to prevent Lugo from returning to that spot rather than going anywhere else, does not constitute a seizure. *See Abbott v. Sangamon County*, 705 F.3d 706, 720 (7th Cir. 2013) (no seizure where officer's order allows person to go anywhere in the world except closer to him).

Finally, Lugo argues that the district court erred in granting summary judgment for Woodford County, the Sheriff's Office, and the unknown supervisors. Because Lugo failed to produce evidence that Burton violated his constitutional rights, he cannot prevail on a *Monell* claim based on the same allegations. *See Swanigan v. City of Chicago*, 775 F.3d 953, 962 (7th Cir. 2015) (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)). And Lugo's claim of supervisory liability against the unknown supervisors from the Sheriff's Office fails because he produced no evidence that any supervisors were personally involved in a constitutional violation. *See Gill v. City of Milwaukee*, 850 F.3d 335, 344 (7th Cir. 2017).¹ Therefore, summary judgment was proper.

AFFIRMED

¹ We note that the district court's grant of summary judgment for the County and the unknown supervisors was sua sponte. Lugo does not assert that this was error, *see Golden Years Homestead, Inc. v. Buckland*, 557 F.3d 457, 461–62 (7th Cir. 2009) (citations omitted) (district court generally must give notice and opportunity to respond before granting summary judgment sua sponte), so any argument along those lines is waived, *see Bradley v. Village of University Park*, 59 F.4th 887, 897 (7th Cir. 2023). In any event, remand would be unnecessary—summary judgment for these defendants was appropriate for the reasons already provided. *See Gabb v. Wexford Health Sources, Inc.*, 945 F.3d 1027, 1034–35 (7th Cir. 2019) (no need to remand when appellant cannot win).