

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDSEY K. SPRINGER

Plaintiff,

Case No. 06-cv-156 TCK-FHM

v.

(1) DOUGLAS HORN individually,
(2) MELODY NOBLE NELSON individually,
(3) BRIAN SHERN individually, AND
(4 through 13) 1 through 10 UNKNOWN
AGENTS OF THE INTERNAL REVENUE
SERVICE individually
(14) AND OTHERS UNKNOWN individually

Defendants.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS

Lindsey K. Springer, Plaintiff in the above entitled action, files his
opposition to the named Defendants' Motion to Dismiss. The Motion should be
denied.

1. PLAINTIFF ALLEGED THEFT TOOK PLACE AT A TIME PERIOD
INCLUDING TIME DEFENDANTS' OCCUPIED AND CONTROLLED
PLAINTIFF'S HOME AND LAND.

Defendants' make an issue of whether Plaintiff has alleged the theft of the
\$ 2,000.00 occurred during the search of Plaintiff's home or at some other time
"following" the search of the home. *Brief @ 1* Defendants also claim that the

“inventory” list given to Plaintiff was “prepared after the search (which ended at 2:40 p.m.) reflected a seizure of ‘approximately \$ 19,000.00 in U.S. Currency.’”

Brief @ 2 This construction by Defendants is nothing other than simply false.

Paragraph 89 alleges that Defendant Shern “stated that the amount of money taken from Plaintiff changed from \$ 19,000.00 when it left Plaintiff’s home to \$ 17,000.00 when it arrived at the bank for deposit into the Government’s account.” This was alleged as Defendant Shern’s statement but was not alleged as to be the truth of the matter.

In the First Bivens Claim, Plaintiff alleges that the Defendants’ decided to “help themselves to \$ 2,000.00 from the money they discovered during the levy...” Paragraph 94 of the Complaint alleges “the act of stealing \$ 2,000.00 from Plaintiff while seizing \$ 19,000.00 is unlawful, unreasonable and contrary to both federal and state law...”

Paragraph 97 of the Complaint alleges that “only \$ 17,000.00 of said seizure actually survived from the search of Plaintiff’s home to the depositing bank...”

Defendants’ claim that somewhere Plaintiff alleges that the “IRS agents departed his home with \$ 19,000.00 in currency.” *Brief @ 5* Not only is this false and misleading, Defendants are fully aware that money belonging to Plaintiff was stolen between the time they took possession of Plaintiff’s property and

remains stolen to this date.

Defendants are aware that they had control and possession of Plaintiff's property early on during the search of Plaintiff's home and that only discovery will show who had the money, how long, and how that property was controlled. Defendants' argue Plaintiff is "unequivocal that the agents departed his residence with \$ 19,000.00." *Id.* Plaintiff again points the Court's attention to no place within Plaintiff's complaint such a construction could be made or let alone unequivocal.

Paragraph 98 of which the Defendants seek to hide begins "As a result of this theft" and continues to allege that the reason why the action of Defendant Nelson and Horn were "outside their official capacity" was because they took actions to "prevent Plaintiff from recovering his money instead of returning it to Plaintiff and informing Plaintiff" that the theft had some reasonable explanation.

In paragraph 102 of Plaintiff's Complaint, Plaintiff alleges that Defendant Nelson and Horn "at all times" were aware of the "**fact a theft had occurred at Plaintiff's home while the service of a warrant...was being conducted.**"

The Fourth Amendment protects a citizen of the United States from searches that are unreasonable. *U.S. v. Guthierrez-Hermosillo*, 142 F.3d 1225, 1229 (10th Cir. 1998) In *United States v. Ramirez*, 523 U.S. 65, 71 (1998), the

Supreme Court stated that the "general touchstone of reasonableness which governs Fourth Amendment analysis" also governs the execution of a search warrant, and that excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment. *U.S. v. Basham*, 268 F.3d 1199, 1204 (10th Cir. 2001)

Furthermore, there is no question that Plaintiff has a long driveway and that the theft could have taken place any time from inside the home, as alleged in Plaintiff's complaint, to while in Plaintiff's garage or driveway, or any other place on Plaintiff's property.

In *Oliver v. United States*, 466 U.S. 170 (1984), the Court held that even when fields are protected by fences or "No Trespassing" signs, they "do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance." *Id.* at 179. This is referred to as the "open fields" doctrine.

Placing a limit on when the Defendants' stole Plaintiff's money to the actual building structure called "residence" in which the money was found and seized, is placing a limitation that the open fields doctrine rejects. If a search warrant is for the entire property then a Fourth Amendment violation can occur anywhere on that property, not just inside the home. Plaintiff also has a detached garage and

several storage buildings. Each of these marginally searched buildings subjects them as places holding property belonging to Plaintiff that is protected by the Fourth Amendment.

The Fourth Amendment provides individuals with security in their homes, and a search warrant, even one properly supported and properly issued, is not a license to breach that security with impunity. An officer's conduct in executing a search is subject to the Fourth Amendment's mandate of reasonableness from the moment of the officer's entry until the moment of departure. *Duncan v. Barnes*, 592 F.2d 1336, 1338 (5th Cir. 1979). However, so long as the officer's conduct remains within the boundaries of reasonableness, an officer has discretion over the details of how best to proceed with a search warrant's execution. *Lawmaster v. Ward*, 125 F.3d 1341, (10th Cir. 1997) Stealing money is not within the discretion of any “officer conduct”.

However, because the touchstone of the constitutionality of an officer's conduct during a search is reasonableness, when executing a search warrant, an officer is limited to conduct that is reasonably necessary to effectuate the warrant's purpose. *Id.* Quoting *Ayeni v. Mottola*, 35 F.3d 680, 689 (2d Cir. 1994), cert. denied, 514 U.S. 1062 (1995); *Ginter v. Stallcup*, 869 F.2d 384, 388 (8th Cir. 1989); *Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982).

Consequently, it is the plaintiff's burden to establish the asserted right's contours are sufficiently clear such that a "reasonable official would understand that what he is doing violates that right." *Id.* Plaintiff alleged that money was stolen by the Defendants and that this established the violated right with utmost sufficiency.

Qualified immunity does not protect official conduct simply because the Supreme Court has never held the exact conduct at issue unlawful. Rather, the shield of qualified immunity is pierced if in light of pre-existing law, the unlawfulness of the conduct is apparent to the officer. *Id.* "This ordinarily means that there must be a Supreme Court or Tenth Circuit opinion on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Id.*

Defendants agree that as long as Plaintiff alleges the Fourth Amendment theft occurred while the Defendants exercised control over Plaintiff's property, Plaintiff's complaint has stated a complaint to which this Court has jurisdiction to allow adjudication.

Defendants' claim that because the evidence of Defendants' attempting to cover up the theft was an independent action outside and apart from the actual theft of Plaintiff's money, this then would not be an act covered by the Fourth

Amendment. *Brief @ 9*

Good try but wrong spin. Paragraph 110 of Plaintiff's Complaint alleges that "Mrs. Nelson and Mr. Horn unauthorized and forbidden actions regarding the theft and cover up of Plaintiff's \$ 2,000.00 taken during the Search of Plaintiff's home, defendants and each of them have violated Plaintiff's right secured under the fourth amendment....."

At all times Defendant Shern was being directed by Defendants Nelson and Horn. Ironically, it is in Plaintiff's home where Defendant Nelson and Horn directed Defendant Shern to return. It is here when Plaintiff discovered the actual crime occurred as Defendant Shern was in Plaintiff's home when he handed the deficient \$ 17,000.00 check to Plaintiff. At no time between September 16, 2005 and January 7, 2006 did any Defendant inform Plaintiff of the stolen \$ 2,000.00.

It is laughable that Defendants have only further wasted Plaintiffs and this Court's time claiming Plaintiff did not allege the theft occurred while the Defendant's occupied Plaintiff's property. Someone should be fired for simply making this argument as it only shows the contempt the Defendants have for the Fourth Amendment rights of this Plaintiff.

Plaintiff simply has stated a Fourth Amendment claim on which this Court can allow relief to be granted.

2. FEDERAL TORT CLAIMS ACT DOES NOT JUSTIFY DISMISSAL

Defendants' next argue that the Federal Tort Claims Act warrants an offer of a remedy in the event this Court finds Plaintiff did not allege the Fourth Amendment theft of Plaintiff's money was not alleged to have occurred while Defendants were in control of Plaintiff's property.

Plaintiff did allege the Fourth Amendment violation occurred while Defendants' were in control of Plaintiff's property during the search of Plaintiff's home and thus this issue is meaningless.

Plaintiff understands the invite by the United States to stand liable for the actions of the Defendants and once this action is on a course for adjudication, Plaintiff intends to seek all FTCA remedies available to him the law allows.

Plaintiff scratches his head on how stealing Plaintiff's money is describable in any other language other than out right intentional theft.

3. PLAINTIFF CHALLENGES UNITED STATES ATTORNEY CERTIFICATION AND DEMANDS THIS COURT REVIEW THAT CERTIFICATION

Defendants foot note # 4 states that they have been "certified" as stealing Plaintiff's money as an act within the scope of their employment. Plaintiff cannot wait to see this reasoning.

The "scope-of-employment certification is reviewable by the district court

in which it applies. *GutierrezDe Martinez v. Lamango*, 515 U.S. 417, 420 (1995)

The certification, removal, and substitution provisions of the Westfall Act, 28 U.S.C. §§ 2679(d)(1)-(3), work together to assure that, when scope of employment is in controversy, that matter, key to the application of the FTCA, may be resolved in federal court. Id. @ 430-31

If, in preserving judicial review of scope-of-employment certifications, Congress "approach[ed] the limit" of federal court jurisdiction, see post, at 441 - and we do not believe it did - we find the exercise of federal court authority involved here less ominous than the consequences of declaring certifications of the kind at issue uncontestable: The local United States Attorney, **whose conflict of interest is apparent**, would be authorized to make final and binding decisions insulating both the United States and federal employees like Lamagno from liability while depriving plaintiffs of potentially meritorious tort claims. The Attorney General, having weighed the competing considerations, does not read the statute to confer on her such extraordinary authority. Nor should we assume that Congress meant federal courts to accept cases only to stamp them "Dismissed" on an interested executive official's unchallengeable representation. Id. @ 436

Under section 2679(d)(1) of FELRTCA, any civil action against an individual defendant who is a government employee acting within the scope of

his employment is deemed an action against the United States. The United States is then substituted as the sole defendant. *Id.* To invoke this provision, the Attorney General or her designed must certify that the defendant was acting within the scope of his employment at the time of the alleged tort. *Id.* The United States Attorney for the District, acting pursuant to his delegated authority, see 28 C.F.R. § 15.3 app. (1990), must sign a certification of scope of employment for Defendants.

This certification, although subject to de novo review, is prima facie evidence that an employee's challenged conduct was within the scope of his employment. The plaintiff then bears the burden of rebutting the scope-of-employment certification with specific facts. *Richman v. Straley*, 48 F.3d 1139 (10th Cir. 1995); See also *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 58, 130 L.Ed.2d 16 (1994); *Brown v. Armstrong*, 949 F.2d 1007, 1012 (8th Cir. 1991); *Hamrick v. Franklin*, 931 F.2d 1209, 1211 (7th Cir.), cert. denied, 502 U.S. 869, 112 S.Ct. 200, 116 L.Ed.2d 159 (1991).

For purposes of the FELRTCA, "scope of employment" is defined by the respondent superior law of the state where the incident occurred. *Nichols v. United States*, 796 F.2d 361, 365 n. 4 (10th Cir. 1986) (citing *Williams v. United States*,

350 U.S. 857, 76 S.Ct. 100, 100 L.Ed. 761 (1955) (per curiam)).

Although determining whether an employee acted within the scope of employment is generally a factual issue, "[i]n situations where the activity is so clearly within or without the scope of employment that reasonable minds cannot differ, it lies within the prerogative of the trial judge to decide the issue as a matter of law." *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1040 (Utah 1991).

In this case, stealing money from Plaintiff while conducting a Search of Plaintiff's home is not within any scope of employment of any Defendant. Reasonable minds cannot differ on this conclusion.

Plaintiff has asked to see the "certification" and has been told it was mailed to Plaintiff on June 13, 2006 by Counsel for Defendants.

Plaintiff respectfully request this Court conduct a de novo review of the "certification" of the U.S. Attorney and determine that stealing money from Plaintiff is not a Fourth Amendment violation that is within any job description the Defendants are authorized to accomplish with their employment duties.

4. DEFENDANT HORN AND NELSON ARE NOT IMMUNE AS THEIR ACTIONS WERE NOT UNDERTAKEN AS ADVOCATE

Plaintiff alleges Defendant Horn and Nelson were in control of Plaintiff's home during the Search warrant and theft as any other Defendant. They directed the Search an they directed whether Plaintiff was to receive his titles and money

back or not. They were aware of the theft and they took steps to cover it up.

Plaintiff will agree that Defendant Horn and Nelson were acting under color of their office as a licenced attorney but that does not authorize them to steal or cover up a theft.

"There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is `neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.' *Hampton v. Chicago*, 484 F.2d 602, 608 (CA7 1973) (internal quotation marks omitted), cert. denied, 415 U.S. 917 (1974). **Thus, if a prosecutor plans and executes a raid on a suspected weapons cache, he `has no greater claim to complete immunity than activities of police officers allegedly acting under his direction.'** 484 F.2d, at 608-609." *Id.*, at 273-274. *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997)

Thus, in determining immunity, we examine "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484

U.S. 219, 229 (1988). This point is perhaps best illustrated by the determination that the senior law enforcement official in the Nation - the Attorney General of the United States - is protected only by qualified, rather than absolute, immunity when engaged in the performance of national defense functions rather than prosecutorial functions. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). *Kalina* @ 127

While the *Kalina* attorney's drafting of the affidavit and determining that the facts contained therein were sufficient to support probable cause were integral to the initiation of the prosecution, *she stepped outside the role of prosecutor and into the role of complaining witness when she attested to the truth of those facts*. See *id.* at 130. See also *Scott v. Hern*, 216 F.3d 897, 909 (10th Cir. 2000)

If *Kalina* stepped outside her role as prosecutor when she became the complaining party, Defendants Horn and Nelson should have no part of any immunity to protect them from claims they stole and helped cover up the theft of Plaintiff's property.

Stealing money that does not belong to you and then taking steps to cover that theft up will never become anything but contrary to law no matter where the parties reside.

This Court should enter an order denying the claims of absolute immunity Defendants' raised in their Motion to Dismiss. This Court should also deny the

absolute immunity claims as no affidavit or declaration has been filed with this Court that could qualify as a “claim of immunity”.

CONCLUSION

Plaintiff respectfully request this Court enter an order denying Defendants’ Motion to Dismiss finding that (1) Plaintiff alleged the Fourth Amendment violation of stealing Plaintiff’s money did occur at a time when the Defendants were occupying and in control of Plaintiff’s home and land, (2) that a Federal Tort Claim is not grounds for dismissal of Plaintiff’s action, (3) there is no evidence of any certification by the U.S. Attorney or that it is accurate, (4) that no evidence exists of any claim of immunity of any kind whatsoever, and (5) that Defendant Horn and Nelson’s actions alleged against them are not protected by absolute immunity because stealing money is not within the job of a advocate for their client.

Respectfully Submitted
/s/ Lindsey K. Springer
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Response in Opposition to the Defendants' Motion to Dismiss was mailed electronically through this Court's ECF system on June 13, 2006, to:

Gerald B. Leedom
Gerald.B.Leedom@usdoj.gov; central.taxcivil@usdoj.gov

/s/ Lindsey K. Springer
Signature