

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

SHARON CARUTHERS and )  
CLARENCE AUSTIN, III, )  
 )  
 *Plaintiff,* )  
 ) No. 90 C 5730  
 -vs- )  
 ) (Judge Moran)  
 WILLIAM L. MACKLIN, CHARLES SAMPSON )  
 VINCE RIZZY, ARTIE HILL, )  
 ERNIE NEWES, JEFF PANAXXO, )  
 DON NAVEZ, )  
 )  
 *Defendants.* )

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

**I. Introduction**

Plaintiffs assert two claims in their second amended complaint, each arising out of the execution of a search warrant at their home in Riverdale, Illinois on August 3, 1990.

In Count I, plaintiffs allege that defendant Macklin, a Harvey police officer, secured the search warrant by making false averments. In its order of November 6, 1991, the Court held that plaintiffs had made the preliminary showing required by *Franks v. Delaware*, 438 U.S. 154 (1978) .

In Count II, plaintiffs challenge the manner in which defendant Macklin and six other Harvey police officers executed the warrant. Plaintiffs allege that defendants

threw Clarence Austin III to the ground and commenced kicking him and then placed handcuffs on him, took him outside of the home and threw him on the ground and put their knee in his back while he was in handcuffs. (Second Amended Complaint, par. 3.)

Plaintiffs also allege that the defendants

forced Sharon Caruthers to exit from the bath and stand in the room without any clothes in front of the said defendants and defendants refused to allow her to get any clothing with which to cover herself. (Second Amended Complaint, par. 4.)

Defendants have moved for summary judgment on all claims. Defendant Macklin claims that he is entitled to qualified immunity on Count I; as to Count II, all defendants contend that they acted reasonably in executing the search warrant.

## **II. Facts**

### **A. The Search Warrant**

On August 3, 1990, a judge of the Circuit Court of Cook County issued a search warrant for "John Doe" and the single family dwelling located at 13702 Lowe Avenue in Riverdale. The warrant described Doe as a black male, five feet eleven inches tall, weighing 160 pounds, with black hair and brown eyes.

To secure the warrant, defendant Macklin averred that he had learned from an arrestee (the "September arrestee") that the arrestee and other Harvey residents were purchasing cocaine from Doe at 13702 Lowe Avenue in Riverdale. According to Macklin, the September arrestee told him that Doe was living at 13702 Lowe Avenue. Macklin averred that "after being informed of this information, [he] had a conversation with [an] informant regarding the sales of narcotics from 13702 Lowe Avenue, Riverdale, Illinois."

According to the warrant affidavit, on August 2, 1990 (the day before he secured the warrant), the informant told Macklin exactly what the "September arrestee" had stated, i.e., that a male black, five feet eleven inches tall, 160 pounds, black hair, brown eyes, was selling cocaine from the single family dwelling at 13702 Lowe Avenue in Riverdale. Macklin described the informant as a person who had been cooperating with the Harvey police department for more than one year and who had provided information that resulted in the arrest of more than 35 persons on more than 22 separate occasions. Macklin claimed that each arrest had resulted in the seizure of controlled substances (which had always tested positive) and "numerous weapons."

Macklin also stated in the warrant affidavit that for the 15 days before he applying for the warrant, he had been "conducting an ongoing narcotics investigation regard ing the alleged sales of narcotics at the location of 13702 Lowe Avenue, Riverdale, Ill Cook County, a single family dwelling."

As his final averment in the warrant affidavit, Macklin stated that on August 2, 1990, he witnessed the CI make a controlled purchase of cocaine with prerecorded money at 13702 Lowe Avenue. Macklin claimed that the CI had told him that he had purchased the cocaine from the same male black who had been described by the "September arrestee."

Based on these averments, the state court judge issued a warrant.

## **B. Execution of the Warrant**

Defendant Macklin, along with defendants Sampson, Rizzy, Hill, Newes, Panazzo, and Navez, executed the warrant on August 3, 1990. The officers were unable to find any narcotics, marked money, or large sums of money. (Macklin Answers to Interrogatory 14.) Nor did the officers find the male black,

five feet eleven inches tall, 160 pounds, black hair, and brown eyes who had allegedly been described by the September arrestee.

Plaintiff Sharon Caruthers were taking a bath when the officers entered her home. (Caruthers Dep. 33.) She heard shouts of "police" and then heard her front door being broken down. (Caruthers Dep. 34.) In response to an officer's order, Sharon came out of the bathroom. (Caruthers Dep. 34.) One of the officers ordered Sharon, who was stark naked, to lay on the floor in a bedroom. (Caruthers Dep. 35.) Sharon obeyed the officer's instructions and stayed on the floor, naked, for about three minutes, until she was permitted to get up and put on a housecoat. (Caruthers Dep. 45.)

The officers were less gentle with Clarence Austin: one of the officers kicked Clarence in the ribs and arms. (Austin Dep. 26-27.) Clarence was also threatened with bodily harm: Sharon heard one of the officers say to Clarence that "If you move, motherfucker, I will blow your brains out." (Caruthers Dep. 57.)

### **C. The Contested Facts**

In considering defendants' motion for summary judgment, the Court must "view the record and all inferences drawn from it in the light most favorable to [plaintiff,] the party opposing the motion." *Lohorn v. Michal*, 913 F.2d 327, 331 (7th Cir. 1990). Viewed in this light, the record establishes that Macklin secured the search warrant by making false, material averments.

First, Macklin admitted at his deposition that his warrant affidavit was untrue. Contrary to the express averments of the warrant affidavit, Macklin did not receive any information from the confidential informant before allegedly arranging the controlled purchase.

Macklin clearly and unambiguously stated at his deposition that the informant had not provided any information, i.e., that the informant's role was limited to allegedly making the purchase (Macklin Dep 54):

Question:: Who initiated this contact [with the confidential informant?]

Macklin:: I did. I contacted him.

\* \* \*

Q: And what did you say to him?

Macklin:: I wanted to make a controlled purchase in this location that was selling narcotics.

Q: And what did he say to you?

A: "How much are you going to pay me?"

Q: So at that point, he had not given you any information up to that point?

Macklin:: No, no, no. He didn't have any information to give us.

Q: You were just —

A: Macklin: No information at all.

Q: You were just going to pay him off for making — I mean pay him for making a controlled purchase?

A: That is correct.

Q: Okay.

Macklin:: Don't forget, he is a paid informant.

Macklin's candid admission that the informant "didn't have any information to give us" is quite different from his averment in the warrant affidavit that:

On 02 Aug. 90, The C/I related to your affiant that a m/b 5'11", 160 lbs. black hair, brown eyes, approximately 20 years of age and of medium complexion was selling cocaine from the residence located at 13702 Lowe Ave., Riverdale, Ill. Cook County, A single family dwelling.

In his interrogatory answers, Macklin confessed to a second material false statement in the warrant affidavit.

Macklin averred in the warrant affidavit that he had conducted "an ongoing narcotics investigation. . . for the past (15) fifteen days." When asked, in interrogatory 3, to specify by date and time when he had conducted the "ongoing narcotics investigation," Macklin was only able to identify August 2, 1990 at 11:30 p.m., when the alleged controlled purchase was made, and August 3, 1990, when the warrant was executed.

Additional falsehoods about the pre-warrant investigation appear in the deposition testimony. At his deposition, Macklin asserted that he and officer Box had gone to 13702 Lowe about 15 days before the alleged controlled purchase; according to Macklin, he and Box got out of their unmarked car and stood on the street, where they watched "suspicious activity" at 13702 Lowe. (Macklin Dep. 33.) Box also testified to a pre-warrant surveillance, but claimed that he and Macklin had remained in their unmarked vehicle, while they watched "suspicious activity." (Box Dep. 31.)

Given Macklin's disregard for the truth, there is little reason to accept his story that he saw an informant purchase cocaine at 13702 South Lowe. This is especially true when Macklin's story about the controlled purchase was contradicted by Box.

According to Macklin, he saw the informant, before making the controlled purchase, walk to 13702 South Lowe and talk to one of the "seven or ten individuals" who were in the yard. (Macklin Dep. 58.) Macklin also claimed that he saw the informant being escorted inside the house by one of the persons who

had been in the yard. (Id.)

Box told a different story (Box Dep. 56):

Question:: What did you observe?

Box:: Observed CI go up to that location. He walked to where the door was. He entered and knocked on the door, entered the residence and after a short while he returned to our location.

There is also little reason to credit Macklin's averment in the warrant affidavit that after returning from 13702 South Lowe, the informant stated that he had purchased the drugs from a male black, five feet eleven inches tall, weighing 160 pounds, with black hair and brown eyes — the best that Macklin could say at his deposition was that "I don't know" what description the informant had related. (Macklin Dep. 62.)

That Macklin lied in his warrant affidavit is consistent with the fact that "a 33-year old male, of light complexion and with a full beard, is not a 20 year old of medium complexion and presumably without a beard," (Mem.Op., Nov. 6, 1991, 3), as well as with plaintiffs' deposition testimony that they do not know the "John Doe" described in the warrant. (Caruthers Dep. 24; Austin Dep. 14.) The final proof of Macklin's falsehoods is the admitted fact that execution of the warrant did not turn up any narcotics, marked money, or large sums of money. (Macklin Answers to Interrogatory 14.)

### **III. Qualified Immunity**

Macklin asserts that he is entitled to qualified immunity because "it was reasonable and proper to obtain a warrant to search Plaintiff's premises." (Def.Mem. 7.) Macklin's argument cannot stand with the false material

statements that he made to obtain the search warrant.

First, the rule that Warrant Clause of the Fourth Amendment requires a "truthful showing" was described as "established law" by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 165 (1978).

Second, "[i]f an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute the truth attended the false statements, not only is his conduct the active cause of the illegal arrest, but he cannot be said to have acted in an objectively reasonable manner." *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985).

As set out above, viewed in the light most favorable to plaintiffs, the record establishes that Macklin made false material statements to secure the search warrant. Macklin is not entitled to any qualified immunity.

#### **IV. Execution of the Warrant**

All defendants assert that they acted reasonably in their interactions with plaintiffs. This claim is plainly frivolous as to plaintiff Austin, who was kicked in the ribs and arms by one of the officers. (Austin Dep. 26-27.)

Defendants do not claim that Austin was resisting arrest or otherwise interfering with the execution of the warrant. We agree that officers may detain occupants of a house during execution of a warrant, *Michigan v. Summers*, 452 U.S. 692 (1981), but a warrant is not a license to beat people up.

Defendants' claim of reasonableness is also without merit as to plaintiff Caruthers. Viewed in the list most favorable to plaintiffs, Sharon Caruthers'

deposition testimony shows that one of the officers ordered her, while she was stark naked, to lay on the floor, (Caruthers Dep. 35), and required her to remain there, unclothed, for about three minutes, until she was permitted to get up and put on a housecoat. Defendants' do not attempt to show that it was reasonable for them to require a naked woman to remain unclothed and the reasonableness of defendants' conduct in this regard should be decided by a jury. Conclusion

## **V. Conclusion**

For the reasons above stated, defendants' motion for summary judgment should be denied.

Respectfully submitted,

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