IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

BENJAMIN BURRUSS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 3:15-cv-00065**
	)	
GARNETT (CHIP) RILEY, et al.	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION FOR RECONSIDERATION

The Plaintiff, Benjamin Burruss (hereafter "Burruss"), has moved for partial reconsideration of this Court's Order (Docket No. 16) to the extent that Order granted the individual officer Defendants' motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6) (Docket No. 5). Specifically, Burruss asks this Court to reconsider its decision and order to dismiss Plaintiff's claims in Count 1 of the Complaint (Docket No. 1) seeking relief under 42 U.S.C. § 1983 for deprivations of Burruss' rights under the Fourth Amendment to the United State Constitution to the extent those claims are based on actions of the individual officer Defendants' "after the issuance of [the Emergency Custody Order.]" (Docket No. 16, ¶ 2). For the reasons set forth below, Burruss respectfully requests that this Court reconsider its decision and order dismissing Plaintiff's Fourth Amendment claims against the individual Defendants (hereafter "the Defendants") to the extent those claims are based on actions of the Defendants occurring after the issuance of the Emergency Custody Order, that the Court vacate that aspect of the Order and enter a new Order denying the Defendants' Motion to Dismiss in its entirety.

I. STATEMENT OF FACTS

Burruss filed this action seeking relief under 42 U.S.C. § 1983 for deprivations of his Fourth Amendment rights to be free of unreasonable searches and seizures against the Defendants, five named officers of the Albemarle County Police Department and other "John Doe" officers arising from the detention of Burruss within his vehicle at the parking lot of the Comfort Inn in Albemarle County in November 2013. The Complaint alleges that after surrounding and immobilizing Burruss' vehicle, the Defendants questioned Burruss in order to determine whether Burruss was subject to a mental health seizure pursuant to Virginia law. Burruss told the officers he was not considering harming himself or others (Docket No. 1, ¶ 31). This was consistent with information the officers had received from Burruss' wife, Kelly, and Burruss' employer that Burruss had not made any statements indicating he was considering harming himself or others (Docket No. 1, ¶¶ 15, 36).

During the incident, Kelly Burruss was contacted by telephone by one of the Defendants, Officer Rigsby. Defendant Rigsby told Kelly that "because [Burruss] had not made any statements to harm himself or others," Kelly should go to a magistrate and seek to obtain an Emergency Custody Order (ECO) so that the officers could continue to detain Burruss (Docket No. 1, ¶ 37). Kelly followed the instructions of Defendant and went to Magistrate Rovelle Brown, who issued an ECO despite the fact that, consistent with the information she provided the police officers, Kelly did not provide the magistrate with any information indicating Burruss had threatened to harm himself or others (Docket No. 1, ¶¶ 43-44). Additionally, the Complaint alleges that Defendant Rigsby spoke to the other Defendants about directing Kelly Burruss to seek an ECO (Docket No. 1, ¶ 38).

The Complaint further alleges that the Defendants knew that they did not have sufficient grounds to conduct a mental health seizure of Burruss (Docket No. 1, ¶¶ 32-33), but sought out other grounds for effecting a seizure of Burruss (Docket No. 1, ¶ 34). At one point, Defendant Riley told Burruss that his (Riley's) boss would not allow Riley to let Burruss leave (Docket No. 1, ¶ 39). When the officers learned that the ECO had been issued by the magistrate, they stormed Burruss' truck and forcibly seized him.

The Defendants filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss Burruss' claims under 42 U.S.C. § 1983. In an order entered June 14, 2016, this Court granted the motion with respect to the officers' actions after the issuance of ECO[.]" (Docket No. 16, ¶ 2). In the Memorandum Opinion accompanying the June 14 order, this Court wrote that the individual officer Defendants "are entitled to qualified immunity for their conduct after the issuance of the ECO, as a reasonable officer would believe that he or she had probable cause at this point to detain Burruss for a mental health evaluation." (Docket No. 15, at 11).

ARGUMENT

A. Standard of Review

A motion for reconsideration is cognizable under Fed. R. Civ. P. 54(b), which provides that any decision or order which fewer than all the claims of a party "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." *See Nautilus Ins. Co. v. Strongwell Corp.*, 968 F. Supp. 2d 807, 822-23 (W.D. Va. 2013) (considering motion for reconsideration of interlocutory order under Fed. R. Civ. P. 54(b)). A motion for reconsideration is committed to the discretion of the district court and is appropriate where the court has, *inter alia*, patently misunderstood a party or where the prior

decision is clearly erroneous and would work manifest injustice. *Porter v. Buck*, 137 F. Supp. 3d 890, 894 (W.D. Va. 2015); *Nautilus Ins. Co.*, 968 F. Supp. 2d at 823.

B. Argument

Burruss asks that this Court reconsider its decision that the individual officer Defendants are entitled to qualified immunity for their conduct after the ECO was issued because those Defendants' entitlement to qualified immunity is a question of fact that should not be resolved on a motion to dismiss under Fed. R. Civ. P. 12(b). In the ruling granting the Defendants' qualified immunity as to their post-ECO conduct, this Court relied upon the decision in *Torchinsky v. Siwinski*, 942 F.2d 257, 262 (4th Cir. 1991), in which the Fourth Circuit indicated there is a "presumption of reasonableness" attached to a law enforcement officer's reliance upon a warrant in effecting a seizure. However, *Torchinsky*, 942 F.2d at 262, also held, in accordance with *Malley v. Briggs*, 475 U.S. 335 (1986), as follows:

> Of course, obtaining an arrest warrant does not provide per se evidence of objective reasonableness. *Malley*, 475 U.S. at 345–46. The presumption of reasonableness attached to obtaining a warrant can be rebutted where "a reasonably well-trained officer in [the officer's] position would have known that his [application] failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345.

Significantly, although the *Torchinsky* court held that a law enforcement officer was entitled to the protection of qualified immunity, it only did so after the facts and circumstances regarding the officer's application for and execution of the arrest warrant were fully developed upon a motion for summary judgment and the court reviewed that evidence at length in connection with ruling that the officer's actions were "objectively reasonable." *Torchinsky*, 942 F.2d at 262-64.

The Supreme Court in *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012), also ruled that a magistrate's issuance of a warrant does not *per se* establish that a law enforcement officer

is entitled to qualified immunity for claims arising from the execution of the warrant. While the court recognized that fact that a magistrate issued the warrant is an indication that its execution by the officers is objectively reasonable,

> [n]onetheless, under our precedents, the fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness. Rather, we have recognized an exception allowing suit when "it is obvious that no reasonably competent officer would have concluded that a warrant should issue." *Malley*, 475 U.S., at 341, 106 S.Ct. 1092. The "shield of immunity" otherwise conferred by the warrant, *id.*, at 345, 106 S.Ct. 1092, will be lost, for example, where the warrant was "based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

Messerschmidt, 132 S. Ct. at 1245 (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984). The *Messerschmidt* court proceeded to examine all the facts and circumstances surrounding the issuance and execution of the warrant before resolving whether the law enforcement officers were entitled to qualified immunity from claims under the Fourth Amendment, reiterating that *Malley*, 475 U.S. at 345, rejected the idea that an officer is automatically entitled to qualified immunity simply because a magistrate had approved the application. *Messerschmidt*, 132 S. Ct. at 1249.

By granting the instant Defendants' qualified immunity for their post-ECO seizure of Burruss, the Court's order effectively gave automatic immunity to the Defendants because of the ECO in contravention of the decisions in *Malley*, *Torchinsky*, and *Messerschmidt*. The Defendants raised qualified immunity as a ground for dismissal under Fed. R. Civ. P. 12(b)(6), and on such a motion the court must accept "all factual allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Kensington Volunteer Fire Dep't v. Montgomery Cnty.*, 684 F.3d 462, 467 (4th Cir. 2012). Whether the instant Defendants acted in an objectively reasonable manner in relying upon and executing the ECO is a question

of fact which should not be resolved on a motion to dismiss. Indeed, *Torchinsky*'s presumption of reasonableness can be rebutted, and if the presumption is rebuttable the plaintiff must be afforded the opportunity to present evidence in rebuttal. The Court's order granting the Defendants qualified immunity for their post-ECO conduct erroneously deprives Burruss of the opportunity to rebut the presumption.

Decisions in other cases demonstrate that qualified immunity should not have been granted to the Defendants at this stage of the litigation. In *Ferrara v. Hunt*, 2010 WL 5479655 (D.S.C. July 19, 2010), a magistrate judge considered a pre-discovery motion for summary judgment in which law enforcement officers asserted they were entitled to qualified immunity for applying for and executing an arrest warrant under the *Torchinsky* presumption. However, the magistrate denied the officers' motion pointing out that the plaintiff had not yet had the opportunity for discovery in order to develop facts showing that the officers did not act in an objectively reasonable manner in relying on the warrant. *Ferrara*, 2010 WL 5479655, at *6. Similarly, in *Whitley v. Prince George's County, Md.*, 2014 WL 5710058 (D. Md. Nov. 3, 2014), the court denied a police officer's motion for summary judgment on the plaintiff's claim that the officer violated the plaintiff's Fourth Amendment rights by arresting the plaintiff upon a warrant issued by a magistrate. In refusing to find the officer was protected by qualified immunity at the summary judgment phase, the court pointed out that discovery had revealed evidence which would allow a jury to find that the officer had reason to believe an eyewitness identification of the plaintiff presented in support of the warrant was unreliable. *Id.* at *4. Because this evidence indicated that the officer did not act in an objectively reasonable manner in executing the warrant, the *Torchinsky* presumption did not require granting the officer summary judgment on the basis of qualified immunity. *Id.* at *9, n. 3. *See also Merchant v. Bauer*, 677 F.3d 656, 665 n. 6 (4th

Cir. 2012) (police officer was not entitled to summary judgment on basis of qualified immunity under *Torchinsky*; resolution of claim to defense had to await resolution of disputed fact issues by a jury).

A police officer is only entitled to qualified immunity if, based on all the facts and circumstances, he or she acted in an objectively reasonable manner in applying for and executing a warrant. The relevant facts and circumstances will include what the officer knew or should have known about the information supporting the warrant. *See Ferrara*, 2010 WL 5479655, at *4-*5 (if police officer knowingly or with reckless disregard included false information in or omitted relevant information from a warrant affidavit, officer is not entitled to qualified immunity for executing a warrant issued by a magistrate). If based on the facts and circumstances known to the officer "'it is obvious that no reasonably competent officer would have concluded that the warrant should issue,'" *Messerschmidt*, 132 S. Ct. at 1245 (quoting *Malley*, 475 U.S. at 341), the officer may not claim qualified immunity for executing the warrant.

In this case, fact questions remain as to what the Defendants knew regarding the basis for the issuance of the ECO and that affect whether the Defendants acted in an objectively reasonable manner. For example, if the Defendants knew or should have known that the Kelly Burruss would provide the magistrate the same information she provided the Defendants, which included information that Burruss had not made any threats of harm to himself or others, the Defendants should have known that the ECO should not have issued and should not have executed it. *See Malley*, 475 U.S. at 346 n. 9 (fact that magistrate erred in issuing warrant does not excuse officers from liability in executing warrant where officers are aware of deficiencies in the basis for the warrant). Consistent with the ruling in *Torchinsky* that any presumption of reasonableness is rebuttable, Burruss should be allowed to develop and present facts showing

that any belief that there was probable cause for the ECO was unfounded and it was obvious that the ECO should not have issued.

Although this Court's ruling indicated that *Malley* and its refusal to grant qualified immunity is distinguishable because the Defendants themselves did not appear before the magistrate for the ECO, it cannot be said that the Defendants' conduct was *per se* reasonable on this account. Kelly Burruss went to the magistrate at the behest of and as the agent of the Defendants and they should not be able to avoid responsibility for knowing that Burruss had exhibited neither evidence of a mental defect nor dangerousness simply because they conducted their request for an ECO through a third party, particularly where they were told by Kelly Burruss that her husband had not made any statements threatening harm (Doc. 1, ¶ 36). Furthermore, it cannot be said definitively that the Defendants acted reasonably in this case because it cannot be said that they had any reason to believe that Kelly Burruss would provide some additional or different information that gave the magistrate probable cause to issue the ECO. In fact, the Defendants may have been aware of facts showing that they had no basis for believing Kelly Burruss would tell the magistrate anything different from what she had told the Defendants. Thus, the fact that the Defendants did not appear before the magistrate does not definitively demonstrate that Defendants' reliance on the ECO was objectively reasonable. *See Snider v. City of Cape Girardeau*, 752 F.3d 1149, (8th Cir. 2014) (police officer was not entitled to qualified immunity under *Messerschmidt* for executing arrest warrant applied for by local prosecutor but which was requested by the police officer) and *Raub v. Bowen*, 960 F. Supp. 2d 602, 612-13 (E.D. Va. 2013) (where record was not sufficiently developed to show what officers knew when they effected a mental health seizure of the plaintiff, the officers were not entitled to dismissal of the plaintiff's Fourth Amendment claim on the basis of qualified immunity).

III. CONCLUSION

For the reasons set forth above, the Plaintiff respectfully requests that this Court reconsider its ruling that Defendants are entitled to qualified immunity for conduct undertaken after the issuance of the ECO, that that part of the June 14, 2016 Order be vacated, and that the Court enter a revised order denying in all respects the Defendants' motion to dismiss Counts I and II of the Complaint.

Respectfully submitted,

BENJAMIN BURRUSS
By counsel

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CERTIFICATE OF SERVICE

I do hereby certify that on this 30th day of June, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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