

STATE OF MICHIGAN
COURT OF APPEALS

REGINA ROARK, as Next Friend of
LEE ROARK,

UNPUBLISHED
April 21, 2000

Plaintiff-Appellant,

v

BRAD OSTRANDER, KELLY SEXTON, and
GARY FORD,

No. 211508
Oakland Circuit Court
LC No. 96-535643-NO

Defendants-Appellees.

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Plaintiff, as next friend of her minor son Lee Roark, appeals as of right from the trial court's order granting summary disposition to defendants, pursuant to MCR 2.116(C)(7), for alleged false arrest and false imprisonment. We affirm.

This case arose out of the arrest of minor plaintiff, Lee Roark (hereinafter "plaintiff"), for attempted first-degree criminal sexual conduct. At 10:39 p.m. on September 12, 1996, Oxford police officer Keith Hess responded to a report of a missing juvenile from a house located at 275 Huntersill. Hess spoke with the juvenile's mother, who stated that the minor, a 13-year-old girl, went to a friend's home and never returned. While at the mother's house, Hess responded to an incident involving two boys chasing a girl. Other officers located the girl while investigating the second incident. Hess returned to the Huntersill address and interviewed the girl, who stated that she was returning home from her friend "Sarah's" house when a group of boys, dressed in red and black, grabbed her, pulled her into the bushes, partially removed her clothes, and fondled her chest and pelvic area. The girl listed the names of several boys, including plaintiff, that she believed were involved in the attack and gave Hess a handwritten statement. At approximately 11:45 p.m., Oxford officer Perry interviewed plaintiff at plaintiff's home. Perry observed that plaintiff was wearing black pants, no shirt, and no shoes or socks. When asked, plaintiff stated that he had worn a light colored t-shirt with a red "Nike" insignia and a red baseball cap earlier in the day. Plaintiff further stated that he had been at home since 8:30 p.m. Although plaintiff's mother was not home, his sister and the sister's boyfriend verified his statement.

On September 13, 1996, defendant-officers Brad Ostrander and Kelly Sexton interviewed the girl at school. During the interview, the girl pointed to plaintiff's picture in a school yearbook, identified him as one of the individuals who attacked her and produced a second handwritten statement regarding the incident. Later that day, the officers arrested plaintiff. Defendant officers Ostrander and Sexton and defendant police chief Gary Ford questioned plaintiff at the police station in the presence of plaintiff's mother. Plaintiff denied the allegations and provided defendant officers a list of people who could verify his alibi. Defendant Ostrander testified that he spoke with the assistant prosecutor Lisa Tomko requesting advice on whether to release plaintiff, explaining to Tomko that the girl had positively identified plaintiff. Defendant Ostrander further testified that Tomko "swayed towards not letting [plaintiff] go."

Following defendant Ostrander's call to the prosecutor's office, defendant Ford made the decision to keep plaintiff in custody. On September 14, the Oakland County prosecutor's office filed a petition in juvenile court charging plaintiff with attempted first-degree criminal sexual conduct. Following plaintiff's arrest, defendants Ostrander and Sexton discovered inconsistencies in the girl's statement. On September 19, the Oxford police department requested assistance from the Michigan State Police in investigating the incident. Eventually, the girl admitted during an interview on September 26 that she had falsely accused plaintiff. Following the girl's retraction, the state dismissed all charges against plaintiff.

In his amended complaint, plaintiff alleged that defendants grossly neglected their duties as police officers in arresting and incarcerating plaintiff. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The trial court granted defendants' motion brought pursuant to MCR 2.116(C)(7), ruling defendants Ostrander and Sexton were entitled to governmental immunity under MCL 691.1407; MSA 3.996(107) because their conduct did not rise to the level of gross negligence as defined by MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). The trial court also held that defendant Ford was entitled to immunity because he was acting within the scope of his executive authority under MCL 691.1407(5); MSA 3.996(107)(5).

First, plaintiff contends that defendants Ostrander and Sexton are not immune from tort liability for false arrest and false imprisonment because they deliberately concealed exculpatory witnesses and evidence when obtaining the arrest warrant. We disagree. Contrary to plaintiff's contention as raised on appeal, our review of the record indicates that plaintiff, a minor, was arrested without a warrant and detained pursuant to the procedure set forth in MCL 764.27; MSA 28.886 and MCR 5.901 *et seq.* The version of MCL 764.27; MSA 28.886 at issue¹ provides, in pertinent part:

Whenever any child under the age of 17 years is arrested with or without a warrant, such child shall be taken immediately before the juvenile division of the probate court of the county wherein the offense is alleged to have been committed and the officer making the arrest shall immediately make and file or cause to be made and filed, a petition against such child. . . [MCL 712A.1 to 712A.28]. . . and the court shall proceed to hear and determine the matter in like manner as provided by said act, as amended.

Although plaintiff was a minor at the time of his arrest, plaintiff's brief is void of any reference to the procedure for detaining a juvenile offender after a warrantless arrest. Plaintiff's contention that defendants Ostrander and Sexton withheld exculpatory evidence from the prosecutor relates to the issuance of the petition against plaintiff pursuant to MCL 712A.2; MSA 27.3178(598.2). Because plaintiff has insufficiently briefed the issue of whether plaintiff was properly detained, we conclude that this issue has been abandoned on appeal. See *Dresden v Detroit Macomb Hospital Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996). Nonetheless, we will consider the issue of whether defendants Ostrander and Sexton had immunity for tort liability with respect to plaintiff's warrantless arrest on September 13, 1996.

The applicability of governmental immunity is a question of law that this Court reviews de novo. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). Pursuant to MCL 691.1407(2); MSA 3.996(107)(2), employees and officers of governmental agencies shall be immune from tort liability for injuries to persons caused by the employees and officers while in the course of employment and while acting on behalf of a governmental agency if all of the following are met:

- (a) The officer . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
- (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
- (c) The officer's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.

Plaintiff does not dispute that defendants Ostrander and Sexton were acting within the scope of their authority and engaged in the discharge of a governmental function as required under MCL 691.1407(2)(a) and (b); MSA 3.996(107)(2)(a) and (b). The sole issue is whether their conduct amounted to "gross negligence" that proximately caused plaintiff's injury as defined in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

If defendants had probable cause to arrest plaintiff, then they were not "grossly negligent" within the meaning of MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) and were immune from tort liability for plaintiff's claim of false arrest. See *Bell v Fox*, 206 Mich App 522, 525; 522 NW2d 869 (1994). The record indicates that defendants relied on the girl's eyewitness identification to establish the necessary probable cause to arrest plaintiff. We agree with the Sixth Circuit Court of Appeal's statement in *Ahlers v Schebil*, 188 F3d 365, 370 (CA 6, 1999) that "[a] law enforcement officer is entitled to rely on an eyewitness identification to establish adequate probable cause with which to sustain an arrest," unless, at the time of the arrest, there exists a reason for the officer to believe that the eyewitness lied, did not accurately describe what was seen or made a mistake in recalling the events.

However, as the court in *Ahlers* noted “[o]nce probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused.” *Id.* at 371.

Here, we cannot conclude that defendants Ostrander and Sexton had any reason to doubt the girl’s identification of plaintiff as one of her attackers. Before arresting plaintiff, defendant officers had interviewed the girl twice and received two written statements from her. In addition, the girl identified plaintiff’s picture from a school yearbook. Furthermore, the evidence indicates that shortly after the alleged attack, plaintiff admitted that he had worn clothing that matched the girl’s description of the clothes worn by her attackers. Plaintiff contends that a reasonable officer in the same or similar circumstances would have investigated plaintiff’s alibi witnesses and concluded that the girl’s identification of plaintiff was untruthful. However, in making this contention, plaintiff relies on events that occurred after plaintiff’s arrest. Because probable cause to arrest is determined by whether the “facts available to the police at the moment of arrest would have justified a fair-minded person of average intelligence and judgment in believing that [the arrestee] had committed a felony,” *Brewer v Perrin*, 132 Mich App 520, 527; 349 NW2d 198 (1984), quoting *People v Goeckerman*, 126 Mich App 517, 521; 337 NW2d 557 (1983), we conclude that the post-arrest matters raised by plaintiff are irrelevant to the probable cause determination. Accordingly, because the knowledge that defendant officers possessed at the moment of plaintiff’s arrest sufficiently established probable cause to arrest plaintiff, we hold that defendants were not grossly negligent in arresting plaintiff, and agree with the trial court’s determination that plaintiff’s claim for false arrest is barred by the governmental immunity statute.

Next, plaintiff contends that defendant Ford cannot claim immunity for participating in the alleged false arrest because his certification as a police officer was revoked retroactively after the incident. Plaintiff has presented no evidence that Ford participated in the warrantless arrest. While the record indicates that defendant Ford participated in the decision to detain plaintiff after his arrest, plaintiff has waived this issue on appeal.

Affirmed.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Brian K. Zahra

¹ Prior to amendment by 1996 PA 418; 1996 PA 255; 1998 PA 67.