

11-2367-cv
Giraldo v. Kessler, et al.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: June 12, 2012 Decided: September 14, 2012)

Docket No. 11-2367-cv

KARLA GIRALDO,
Plaintiff-Cross-Defendant-Appellee,

- v. -

SCOTT EVAN KESSLER, Assistant District Attorney, Bureau Chief of
Domestic Violence, individually and in his official capacity,
KESHIA ESPINAL, Assistant District Attorney, in her official
capacity,
Defendants-Cross-Defendants-Appellants,

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, SEAN WARD,
Detective, in his official and individual capacity, THOMAS
FITZGERALD, P.O., in his official and individual capacity,
Defendants-Cross-Defendants,

SAFE HORIZON, INC., ENIDIA SEOANE, RICHARD A. BROWN, Queens
County District Attorney, individually and as the District
Attorney of Queens County, NORTH SHORE LONG ISLAND JEWISH HEALTH
SYSTEM, INC., DAWNE KORT, M.D., SUSAN CABIBBO, R.N., DANIEL
FROGEL, DR.,
Defendants-Cross-Defendants-Cross-Claimants.

B e f o r e: WINTER, CABRANES, and CARNEY, Circuit Judges.

1 Appeal from a denial of absolute prosecutorial immunity by the
2 United States District Court for the Eastern District of New York
3 (John Gleeson, Judge). We vacate and remand.

4 ELIZABETH S. NATRELLA (Leonard
5 Koerner, on the brief), of counsel,
6 for Michael A. Cardozo, Corporation
7 Counsel of the City of New York,
8 New York, New York, for Defendants-
9 Appellants.

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11 CHRISTOPHER BELLISTRI, Cronin &
12 Byczek LLP, Lake Success, New York,
13 for Plaintiff-Appellee.

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15 Janet DiFiore, District Attorney,
16 Anthony J. Servino, Richard
17 Longworth Hecht, Steven A. Bender,
18 Assistant District Attorneys, of
19 counsel, Westchester County
20 District Attorney's Office, White
21 Plains, New York, for Amicus Curiae
22 District Attorneys Association of
23 the State of New York in support of
24 Defendants-Appellants.

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26 WINTER, Circuit Judge:

27 Queens County Assistant District Attorneys Scott Evan
28 Kessler and Keshia Espinal appeal from Judge Gleeson's denial of
29 absolute immunity in an action brought under, inter alia, 42
30 U.S.C. § 1983. Karla Giraldo, the plaintiff-appellee, alleged in
31 her complaint that appellants' interrogation of her following the
32 arrest of her boyfriend, former New York State Senator Hiram
33 Monserrate, violated her civil rights.¹ We vacate and remand.

34

¹Although appellee did not identify her "boyfriend" by name in the complaint, the district court took judicial notice that the references are to Monserrate. No party disputes the truth of that conclusion.

1 BACKGROUND

2 We view the facts alleged in the complaint in the light most
3 favorable to appellee. See Warney v. Monroe County, 587 F.3d
4 113, 116 (2d Cir. 2009). We also take judicial notice of
5 relevant matters of public record. See, e.g., Shmueli v. City of
6 New York, 424 F.3d 231, 233 (2d Cir. 2005); Fed. R. Evid. 201(b)
7 (permitting judicial notice of facts "not subject to reasonable
8 dispute").

9 On December 19, 2008, appellee suffered a laceration above
10 her left eye requiring twenty stitches to close. Monserrate
11 brought her to a hospital emergency room for treatment. There,
12 she was seen by defendants Dr. Kort and Dr. Frogel. Appellee
13 told them that she was injured as a result of an "accident" that
14 occurred when her boyfriend brought her a glass of water that
15 broke, causing shards to fly and cut her forehead. Doctors Kort
16 and Frogel suspected domestic abuse and contacted the New York
17 City Police Department. Appellee also told Nurse Susan Cabibbo
18 that she was not in need of protection and that she was not
19 involved in an altercation. The nurse nevertheless contacted the
20 police and informed them that appellee was a victim of domestic
21 violence.

22 Soon afterward, Police Officer Fitzgerald and another
23 unidentified officer arrived at the hospital and interviewed
24 Monserrate and appellee separately. Officer Fitzgerald then
25 arrested Monserrate. After the completion of appellee's

1 treatment, Kort and Frogel did not allow appellee to leave and
2 had her transported to the 105th Precinct where she was kept for
3 more than five hours. At the precinct, Detective Ward
4 interrogated appellee regarding her injury, and she consistently
5 responded that it was the result of an accident. Detective Ward
6 then "ordered" appellee to sign a statement accusing Monserrate
7 of assaulting her, but she refused. Appellee continued to be
8 interrogated by police personnel.

9 After the police interrogation, appellee was taken against
10 her will to the Queens District Attorney's office, where she was
11 interviewed by appellants. Appellee states she told appellants
12 that she did not want to talk, but that they nevertheless
13 continued to interrogate her. After two hours of interrogation
14 by appellants, appellee was released.

15 Meanwhile, on the day of the injury and arrest, Monserrate
16 was arraigned and bail was posted. See People v. Hiram
17 Monserrate, Docket Number 2008QN067420 (felony complaint filed
18 and dated December 19, 2008, charging two counts of felony
19 assault in the second degree and one count of misdemeanor
20 criminal possession of a weapon in the fourth degree; Monserrate
21 posted bail on December 19, 2008); see also Shmueli, 424 F.3d at
22 233 ("The New York State . . . prosecution of Shmueli is a matter
23 of public record, of which we take judicial notice."); cf.
24 Warney, 587 F.3d at 118 (taking judicial notice of federal habeas
25 corpus petition on appeal).²

²We may also take notice of the fact that Monserrate was convicted of third-degree assault in connection with the incident. See People v. Monserrate, 90 A.D.3d 785, 785-86, 934 N.Y.S.2d 485, 487-88 (2d Dep't 2011),

1 Appellants moved to dismiss the complaint on various
2 grounds, including absolute immunity. The district court denied
3 the motion. On the merits, the court held that appellee's
4 allegations of being "unlawfully detained, held against her will
5 and maliciously interrogated" by appellants in violation of her
6 right to be free from unreasonable seizures stated plausible
7 Section 1983 claims. The court also held that appellee could
8 bring claims against appellants in their individual capacities,
9 but that she could not proceed against them in their official
10 capacities because doing so would constitute an impermissible
11 action against the Queens District Attorney's office. Finally,
12 on the issue before us, the court rejected appellants' argument
13 that absolute immunity shielded them from liability, finding that
14 their "conduct in this case [was] more closely linked to the
15 prosecutor[s'] investigative duties [rather] than to [their] role
16 as government litigator[s]"

17 This appeal followed.

18 DISCUSSION

19 This is, of course, an interlocutory appeal. However,
20 because prosecutorial immunity is intended to shield prosecutors
21 from legal proceedings, as well as liability, a denial of
22 immunity is final as to the need to proceed with the action and,
23 at least as to matters of law, is reviewable under the collateral
24 order doctrine. See, e.g., Hill v. City of New York, 45 F.3d
25 653, 659-60 (2d Cir. 1995); Kaminsky v. Rosenblum, 929 F.2d 922,
26 925-26 (2d Cir. 1991); see also Nixon v. Fitzgerald, 457 U.S.

lv. denied, 18 N.Y.3d 996, 968 N.E.2d 1007 (2012).

1 731, 742-43 (1982) (jurisdiction to review denial of absolute
2 immunity under the collateral order doctrine if the denial
3 involves only a question of law). We review such issues of law
4 de novo. See Warney, 587 F.3d at 120.

5 Absolute immunity bars a civil suit against a prosecutor for
6 advocacy conduct that is “intimately associated with the
7 judicial phase of the criminal process.” Imbler v. Pachtman, 424
8 U.S. 409, 430 (1976). This immunity attaches to conduct in
9 court, as well as conduct “preliminary to the initiation of a
10 prosecution and actions apart from the courtroom.” Id. at 431
11 n.33.

12 An official claiming immunity bears the burden of showing
13 that the particular immunity claimed applies. See Burns v. Reed,
14 500 U.S. 478, 486-87 (1991). In determining whether absolute
15 prosecutorial immunity attaches, we apply a “functional
16 approach.” Hill, 45 F.3d at 660. “Prosecutorial immunity from
17 § 1983 liability is broadly defined, covering ‘virtually all
18 acts, regardless of motivation, associated with [the
19 prosecutor’s] function as an advocate.’” Id. at 661 (quoting
20 Dory v. Ryan, 25 F.3d 81, 83 (2d Cir. 1994)). The Supreme Court
21 has explained that a prosecutor’s functions preliminary to the
22 initiation of proceedings include “whether to present a case to a
23 grand jury, whether to file an information, whether and when to
24 prosecute, whether to dismiss an indictment against particular
25 defendants, which witnesses to call, and what other evidence to
26 present.” Imbler, 424 U.S. at 431 n.33.

1 Analysis of a claim of immunity requires us to view the
2 relevant circumstances as would a reasonable official in the
3 claimant's position.³ See Hill, 45 F.3d at 662 ("[T]he
4 'functional' test for absolute immunity is an objective one; it
5 does not depend upon the state actor's subjective intent.");
6 Dory, 25 F.3d at 83; see also Burns, 500 U.S. at 487-88
7 (allegations that prosecutor "deliberately misled the Court"
8 during preliminary hearing were deemed irrelevant where the
9 prosecutor's objective act -- presenting evidence at the hearing
10 -- enjoyed absolute immunity). The relevant question, therefore,
11 is whether a reasonable prosecutor would view the acts challenged
12 by the complaint as reasonably within the functions of a
13 prosecutor. If the generic acts are within those functions,
14 absolute immunity applies to protect the prosecutor even in the
15 face of a complaint's allegations of malicious or corrupt intent
16 behind the acts. See id. at 489-90. Otherwise, the absolute
17 immunity would not be absolute.

18 Under a functional approach, actions are not shielded by
19 absolute immunity merely because they are performed by a
20 prosecutor. "A prosecutor's administrative duties and those
21 investigatory functions that do not relate to an advocate's
22 preparation for the initiation of a prosecution or for judicial
23 proceedings are not entitled to absolute immunity." Buckley v.
24 Fitzsimmons, 509 U.S. 259, 273 (1993). In Buckley, the plaintiff

³In many cases, of course, the underlying circumstances may be in dispute. See, e.g., Grp. Health Inc. v. Blue Cross Ass'n, 793 F.2d 491, 497 (2d Cir. 1986) (dismissing defendant's claim of absolute immunity on appeal where questions of fact were at issue). However, the allegations of the complaint here are sufficient to resolve the issues in this case.

1 sought damages from prosecutors for, inter alia, allegedly
2 “fabricating evidence during the preliminary investigation of a
3 crime.” Id. at 261. In holding that the prosecutors were not
4 entitled to absolute immunity, the Court stated that a prosecutor
5 “neither is, nor should consider himself to be, an advocate
6 before he has probable cause to have anyone arrested.” Id. at
7 274.

8 “[A]ctions taken as an investigator enjoy only qualified
9 immunity.” Zahrey v. Coffey, 221 F.3d 342, 346 (2d Cir. 2000).
10 “Although all investigative activity could be considered in some
11 sense to be ‘prepar[ation] for the initiation of judicial
12 proceedings,’ the Supreme Court has sought to draw a line between
13 those preparatory steps that a prosecutor takes to be an
14 effective advocate of a case already assembled and those
15 investigative steps taken to gather evidence.” Smith v.
16 Garretto, 147 F.3d 91, 94 (2d Cir. 1998) (quoting Buckley, 509
17 U.S. at 273). The Supreme Court “has identified ‘evaluating
18 evidence and interviewing witnesses’ as falling on the absolute
19 immunity side of the line, leaving ‘searching for the clues and
20 corroboration’ that might lead to a recommendation for an arrest
21 on the qualified immunity side.” Id. at 94 (quoting Buckley, 509
22 U.S. at 273).

23 Therefore, not every interview, interrogation, or other act
24 by a prosecutor with the potential of revealing new information
25 is an investigative act entitled to only qualified immunity. See
26 Warney, 587 F.3d at 124 (prosecutors’ actions to deal with post-
27 trial initiatives challenging a criminal conviction, even though

1 they could be seen as investigative and administrative, were
2 "also integral to the overarching advocacy function"). Good
3 prosecutors may -- usually should -- perform acts reasonably
4 characterized as investigative at all phases of a criminal
5 proceeding. The investigative acts that are entitled to only
6 qualified immunity are those undertaken in the phase of law
7 enforcement that involves the gathering and piecing together of
8 evidence for indications of criminal activities and determination
9 of the perpetrators. Smith, 147 F.3d at 94.

10 In contrast, investigative acts reasonably related to
11 decisions whether or not to begin or to carry on a particular
12 criminal prosecution, or to defend a conviction, are shielded by
13 absolute immunity when done by prosecutors. To be sure, as the
14 Supreme Court cautioned in Buckley, even the presence of probable
15 cause "does not guarantee a prosecutor absolute immunity from
16 liability for all actions taken afterwards." 509 U.S. at 274
17 n.5. Such acts are shielded by absolute immunity only when they
18 are of a kind reasonably related to the ordinary functions of a
19 prosecutor with such probable cause.

20 Viewed through the eyes of a reasonable prosecutor,
21 appellants' acts in the present case were well within their
22 legitimate functions as prosecutors. Monserrate had been
23 arrested prior to appellants' interview of appellee. Once the
24 arrest took place, legal decisions at the core of the
25 prosecutorial function -- pursuit of the charges, arraignment,
26 bail, etc. -- had to be made by appellants and made quickly. The
27 interview of appellee was clearly in a "pending or in preparation

1 [of] a court proceeding in which the prosecutor acts as an
2 advocate." Warney, 587 F.3d at 123.

3 Appellee was obviously an important witness with regard to
4 the proceeding against Monserrate. That she claimed her injuries
5 resulted from an accident hardly weighed against interviewing
6 her. Viewing the circumstances objectively, her claim that her
7 injuries were the result of an accident might well cause a
8 reasonable prosecutor to believe that interrogation was even more
9 necessary than would have been the case in more common
10 circumstances. A reasonable prosecutor easily could -- should --
11 have viewed a first-hand interview and personal weighing of the
12 credibility of appellee's self-propelled-shattering-glass story
13 as necessary. While questioning an important witness may
14 accurately be described as investigative, appellants' interview
15 was an integral part of appellants' advocacy function as
16 prosecutors protected by absolute immunity. See, e.g., Imbler,
17 424 U.S. at 430.

18 Because the objective circumstances triggered absolute
19 immunity, appellee's allegations that the interview was in
20 furtherance of a conspiracy to "create statements that would
21 falsely implicate [Monserrate] of a crime and falsely state
22 comments that were allegedly made by [appellee]" are irrelevant.
23 See, e.g., Hill, 45 F.3d at 662.

1 CONCLUSION

2 For the foregoing reasons, the order of the district court
3 dated May 27, 2011, denying absolute immunity to the appellants
4 is vacated and remanded for proceedings consistent with this
5 opinion.
6