CASE NO. 15-35404

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SHERRI ROBERTS,

Plaintiff - Appellant,

RANDY ELLIOT, JIM SCOTT, HAWK HAAKANSON, and UNITED STATES OF AMERICA,

Defendants – Appellees.

On Appeal from a Decision of the United States District Court
For the District of Montana, Billings Division
No. 1:13-cv-00026-SEH and 1:14-cv-000016-SEH
Honorable Sam E. Haddon

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST PLAINTIFF.

A. The District Court Clearly Erred in Ruling That the BIA Officers Are Entitled to Qualified Immunity.

Roberts brought *Bivens* claims against three BIA law enforcement Officers, Haakanson, Elliot, and Scott, in their individual capacities, for violation of her constitutional rights under the Fourth and Fifth Amendments to the United States Constitution. In response, the BIA Officers assert that qualified immunity shields them from any liability on the basis they did not violate clearly established law. (Brief of Appellees, p. 23.) Their assertion is flawed. The law concerning a Tribal court's complete lack of criminal jurisdiction over a non-Indian had been clearly established for over thirty-two years prior to the Officers' action taken against Roberts. *See Oliphant v Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (United States Supreme Court held by implication that the Suquamish Tribe's judiciary had no criminal jurisdiction over non-Indians.) The Supreme Court went so far as to hold that as a whole, "Indian tribes do not have inherent jurisdiction to try and punish non-Indians." *Id.*

The Northern Cheyenne Tribal Court simply does not have criminal jurisdiction over a non-Indian and had no subject matter jurisdiction over Roberts. A reasonably competent law enforcement officer who is employed on an Indian Reservation should be charged with this knowledge of the criminal law. Each Tribal Court warrant served upon Roberts was void from the start of the criminal case because the Tribal Court lacked any subject matter jurisdiction over non-Indians, including Roberts, on the Northern Cheyenne Reservation. Judge Brady admitted that she know Roberts was a non-Indian. (ER 92, 93). Officers Scott and Haakanson do not dispute Roberts' assertion that they knew she was a non-Indian, and that they knew the Tribe lacked any criminal jurisdiction over non-Indians. While Elliot claims he did not know Roberts' status, this fact is in dispute and should be resolved in Roberts' favor for purposes of summary judgment.

The BIA Officers go on to claim that their good faith execution of facially valid warrants cannot be characterized as unreasonable under the circumstances, citing *Whiteley v. Warden*, 401 U.S. 560, 568 (1971). (Brief for the Appellees, p. 24). In *Whiteley*, the Supreme Court recognized that police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. "Where, however, the

contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." 401 U.S. at 569. The Supreme Court held that the complaint on which the warrant issued clearly could not support a finding of probable cause by the issuing magistrate. *Id.* Similarly, in the case at bar, these BIA Officers cannot be insulated from liability by the fact that a Tribal Judge issued the warrants commanding them to arrest a non-Indian and bring her before a Tribal court that they knew or reasonably should have known had no criminal jurisdiction over her.

The BIA Officers further assert that qualified immunity would shield them from liability as they did not violate clearly established rights, citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). (Brief of Appellees, p. 24.) In *Harlow*, the Supreme Court recognized that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public officer should know the law governing his conduct." *Id.*, 475 U.S. at 818. In the case at bar, these Officers knew Roberts was a non-Indian and that the Tribal court held no jurisdiction over her. They did not just arrest Roberts for failing to go before a court that had no jurisdiction over her but also delivered her to the Tribal jail to be detained. The reasonableness of their actions should not be decided on summary judgment.

The BIA Officers cite to *Saucier v. Katz*, 533 U.S. 194, 202 (2001), for the

two-part process for analyzing the application of qualified immunity. First, it is determined whether an officer's conduct violated a constitutional right. *Id.* In the case at bar, these officers clearly violated Roberts' right to due process by citing, arresting and detaining her when the Tribal Court had no criminal jurisdiction over her. The next step is to determine whether the law was clearly established. *Id.* There should be no doubt that the law was clearly established. The BIA Officers claim that each of the warrants had been "signed by a judicial officer of the Tribal Court" commanding the officers to arrest Roberts and bring her before the court for failure to appear at two court-ordered status conference in which the Tribal court had no jurisdiction. (Brief of Appellees, p. 26).

Their argument fails concerning the warrants being "facially valid" and signed by a judicial officer. It would be akin to saying that a warrant issued to Roberts' dog would be reasonable since it appears correct on its face and is signed by a judicial officer. Such a warrant would certainly be characterized as unreasonable under the circumstances. Likewise, in the case at bar, the warrant to arrest Roberts and bring her before the Tribal court was not reasonable insofar as the Tribal court lacked criminal jurisdiction over non-Indians since at least 1971. Certainly, any law enforcement officer enforcing law on the Northern Cheyenne Indian Reservation would know the state of the law concerning criminal jurisdiction.

The BIA Officers claim that Roberts misapprehends the qualified immunity analysis when she cites to *Oliphant* as controlling authority. (Brief of Appellees, p. 27.) The Officers cite to *Wilson v. Layne*, 526 U.S. 603, 614 (1999) to support their position that the qualified immunity inquiry rests on the "objective legal reasonableness of the [official's] action, assessed in light of the legal rules that were clearly established at the time it was taken." In *Wilson*, the Supreme Court held that a media "ride-along" in a home violates the Fourth Amendment, but because the state of the law was not clearly established at the time the entry in this case took place, the respondent officers were entitled to qualified immunity. 526 U.S. at 614.

While the illegality of a media ride-along in a home may not have been clearly established in 1999, the law concerning whether a non-Indian can even be brought before the criminal Tribal court lacking in any subject matter jurisdiction was clearly established in 2010 and 2011. The record shows that Roberts even discussed this specific issue with each of the named BIA Officers over the years. None of the Officers controvert her assertions.

The BIA Officers cite to *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), where the Supreme Court recognized that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . This is not to say that an official action is protected by

qualified immunity unless the very action in question has previously been held unlawful, . . . but is to say that in the light of pre-existing law the unlawfulness must be apparent." (Brief of Appellees, p. 27.) In the case at bar, every reasonable officer would have known that arresting and jailing a non-Indian in a Tribal jail on a Tribal court warrant were unlawful actions. These officers were undeniably on notice that their conduct was unlawful. The BIA Officers' defense of qualified immunity should have been precluded at the summary judgment phase. Their Constitutional violations are obvious on the facts alleged. Just a glance at the warrant would show that it was facially deficient since it names a non-Indian to appear before the Tribal Court on a criminal matter. These BIA officers did cross a "constitutional bright line" as they were fully on notice that their conduct would be unlawful.

The BIA officers specifically knew that Roberts was a non-Indian and not the member of any Tribe. They had had many contacts with Roberts in the past. (ER 22-36, 64, 97, 103, 104). Being Officers that specifically enforced law on an Indian Reservation, they knew that the Tribal criminal court did not extend to non-Indians. These officers exercised discretion in their actions. It would require a stretch of the imagination to think these Officers did not know the proper procedures involving non-Indians in a criminal matter. There is simply no criminal jurisdiction over a non-Indian. This law was "clearly established" and

"sufficiently clear" in 2010 and 2011. These BIA Officers were on notice that the Tribal Court acted in complete absence of jurisdiction in issuing the warrants. In carrying out the mandate, these Officers would have known they were engaging in an unlawful act. At the minimum, there are genuine issues of material fact that would preclude summary judgment.

B. Roberts' Claims Against the United States Under the FTCA Can Be Sustained under Montana Law.

Roberts relies on the Federal Torts Claims Act (FTCA) for its sovereign immunity and grant of jurisdiction in this Court. The FTCA provides, in part, that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C. § 2674.

1. ROBERTS CAN SUSTAIN HER CLAIM OF FALSE ARREST AND FALSE IMPRISONMENT BECAUSE SHE WAS ARRESTED AND JAILED PURSUANT TO AN INVALID WARRANT.

Citing *Kichnet v. Butte Silverbow County*, 274 P.3d 740, 745 (Mont. 2012), the United States asserts that Roberts cannot sustain her claims under Montana law as she was arrested and detained pursuant to a facially valid warrant. (Brief of Appellees, p. 40). In *Kichnet*, the district court stated that to establish a claim of false arrest and false imprisonment under Montana law, a plaintiff must

demonstrate: "(1) the restraint of an individual against his will, and (2) the unlawfulness of the restraint." The United States claims Roberts cannot establish the second element of her claims since probable cause for arrest is a complete defense to claims of false arrest and false imprisonment. (Brief of Appellees, p. 41.) However, probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested." *See,* for example, *United States v. Loper,* 482 F.3d 1067, 1072 (9th Cir. 2007). It is unknown how an officer with knowledge of Roberts being a non-Indian and with knowledge of the lack of criminal jurisdiction in the Tribal court could reasonably believe there was probable cause to bring Roberts before a Tribal Court that had no jurisdiction over her. In other words, her only "wrong" for which she was arrested and jailed, and for which the United States claims probable cause existed, was Roberts' failure to appear before a Tribal court that had no jurisdiction over her. It is inconceivable how there could be probable cause for the "offense" of a non-Indian failing to come before a Tribal court that has no criminal jurisdiction over the non-Indian.

The warrant was not valid on its face. The warrant was issued solely because Roberts did not appear at a status hearing before a Tribal court that had no criminal jurisdiction over her and for which she received no notice of the hearing.

A warrant that is improper does not necessarily constitute probable cause for an arrest. For example, *see*, *Berg v. County of Allegheny*, 219 F.3d 261, 271, (3rd Cir 2000) (holding that improperly issued warrant cannot constitute probable cause for an arrest.)

The question would become whether a reasonably well-trained officer would have realized that there was wholly insufficient probable cause to issue the warrant. *United States v. Leon*, 468 U.S. 897, 913-816 (1984) (law enforcement officer is not simply required to blindly follow the commands of a warrant if not reasonable.) BIA Officer Elliot reasonably would know he could not arrest, detain and jail a non-Indian because that non-Indian failed to come before the Tribal court that had no jurisdiction over it.

The deference accorded to a magistrate's finding of probable cause for the issuance of a warrant does not preclude inquiry into the knowing or reckless falsity of the affidavit on which the probable cause determination was based. *Id.*, 468 U.S. at 918-921. The Supreme Court recognized that a police officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant she issues must be objectively reasonable. Id. An officer would not manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render an official belief in its existence entirely unreasonable. The executing officer cannot reasonably presume it to be

valid. *Leon*, 468 U.S. at 918-22. At the minimum, there are genuine issues of material fact as to Officer Elliot's belief as to the validity of the warrant, precluding summary judgment.

2. ROBERTS RAISES AN ACTIONABLE CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS THAT SHOULD BE DECIDED BY THE FACT FINDER.

Roberts alleged a cause of action for negligent infliction of emotional distress against the United States. The United States responds by claiming that Roberts' emotional distress does not rise to the level of being severe, citing *Sacco v. High Country Independent Press*, 271 Mont. 209, 234, 896 P.2d 411, 416-428 (1995). (Brief of Appellees, p. 47.) In *Sacco*, an independent cause of action for negligent infliction of emotional distress arises under circumstances where (1) serious or severe emotional distress to the plaintiff was (2) the reasonably foreseeable consequence of (3) that defendant's negligent act or omission. *Sacco* 271 Mont. at 234, 896 P.2d at 416-428.

The court is to first determine whether, on the evidence, serious emotional distress can be found. *Renville v. Fredrickson,* 2004 MT 234, 16, 324 Mont. 86, 101 P.3d 773. If the Court makes this determination, then the fact-finder must determine if, on the evidence, it has in fact existed. *Popisil v. First Nat. Bank of Lewistown*, 2001 MT 286, § 24, 307 Mont. 704.

Roberts experienced serious emotional distress caused by the actions of the BIA officers. Roberts had no criminal record prior to being arrested and jailed twice by these BIA officers. (ER 66 at 17-25). Being arrested was extremely traumatic. She was scared to death. Roberts was very modest and had to undress in front of cameras. (ER 67 at 1-25). She had not taken her heart medicine at that time of the day of the arrest and was scared she would have a heart attack while at the jail. (ER 68 at 20-25). Whether or not Roberts did in fact suffer serious emotional distress should have been delegated to the fact finder and not decided on summary judgment by the district court.

Roberts had lost her health insurance at the time and could not afford to formally go see anyone for mental health treatment. (ER 20 at 11-25, 69). Roberts did do private one on one counseling with two friends who were trained professionals, one a friend in Minnesota with a master's in social work and the other a school board member in Lame Deer with a master's in social work. Because she had lost her job with the Lame Deer School District she had no income to be lost. (ER 20 at 12-13, 21 at 4-14).

Roberts' suffering is consistent with the definition of serious emotional distress adopted in *Sacco*, and she has cited sufficient evidence on which the district court could have found that it existed, so that a jury could determine that it did in fact exist.

However, rather than making any determination concerning emotional distress, the district court simply found that Officer Elliot's actions in executing the Tribal Court warrant was not a negligent or wrongful act or omission. Again, it is disputed whether or not Elliot knew her status and knew of the Tribal court's lack of any jurisdiction over her. Roberts claims that Elliot was entirely aware of her non-Indian status as well of the lack of criminal jurisdiction. It is in dispute whether or not Elliot had a reasonable basis to believe that the warrant and his actions were valid and lawful, or void and unlawful. Elliot does not contest Roberts' assertion that they had many conversations about her non-Indian status and the issue of jurisdiction. Certainly, the trier of fact could find that Officer Elliot's actions were not reasonable under the circumstances, and that Roberts could have suffered serious emotional distress consistent with the definition adopted in *Sacco.* The District Court erred in deciding these factual disputes upon the Defendants' motion for summary judgment.

II. CONCLUSION

For the foregoing reasons, Plaintiff/Appellant Sherri Roberts respectfully requests that this Court reverse the decision of the District Court, granting summary judgment to the Defendants, and remand the case to the District Court for trial.

DATED this 16th day of February, 2016.

HONAKER LAW FIRM

/s/ *Elizabeth J. Honaker*
Attorney for Plaintiff/Appellant

III. CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7) of the Rules of the United States Court of Appeals for the Ninth Circuit and Circuit Rule 32-1, I hereby certify that this Brief of Appellant is printed with a proportionately spaced Times New Roman text typeface of 14 points, and the word count is 4,056, excluding caption, certificate of service, and certificate of compliance. I have relied on the word count of a word-processing system used to prepare the brief.

DATED this 16th day of February, 2016.

s/s *Elizabeth J. Honaker*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 16, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system sent to:

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