21-616

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DAVID T. SILVA, GERROD T. SMITH, JONATHAN K. SMITH,
MEMBERS OF THE SHINNECOCK INDIAN NATION,

Plaintiffs-Appellants,

—against—

BRIAN FARRISH, JAMIE GREENWOOD, EVAN LACZI, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE, BASIL SEGGOS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES JAMIE GREENWOOD AND SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE

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PRELIMINARY STATEMENT

Jamie Greenwood and the Suffolk County District Attorney's Office[1] (County Defendant-Appellees), submit this brief in opposition to the Plaintiff-Appellants Notice of Appeal and Brief requesting that the determination of the District Court below granting summary judgment on all Defendants claims be reversed and remanded. For the reason below, the lower Court's granting of summary judgment should be affirmed.

In the matter below, Plaintiff-Appellants brought various claims against the New York State Department of Environmental Conservation (DEC), officers working for the DEC and Suffolk County Assistant District Attorney Jamie Greenwood and the Suffolk County District Attorney's Office. (A-16). As noted in the Plaintiff- Appellants' brief, their initial request for a preliminary injunction was denied by the District Court, the County and State moved to dismiss per Fed.R.Civ.P. Rule 12(b)(6), and the Hon. Magistrate Steven. I. Locke issued a Report and Recommendation that the Appellants claim be dismissed. Without reaching a determination on the Report and Recommendation, the Honorable District Judge Sandra J. Feuerstein *sua sponte* converted the Rule 12(b)(6) motions

[1] The District Court correctly determined that the Suffolk County District Attorney's Office is not an entity susceptible to suit. SPA-7; Decision of the Hon. Sandra J. Feuerstein at ftnt 6. (Pagination preceded by "SPA" refers to the Plaintiffs-Appellants' Special Appendix. Pagination preceded by "A" refers to the Plaintiffs-Appellants' Appendix)

into motions for summary judgment, and ordered new briefing. Judge Locke then issued a Report and Recommendation that the motions for summary judgment should be granted. Plaintiff-Appellants filed objections to the Report and Recommendation and the District Court overruled the objections and granted the Defendant-Appellees motion for summary judgment. (SPA-7). In adopting the Report and Recommendation and granting summary judgment the lower Court determined that the Suffolk County District Attorney's Office does not have a legal identity separate and apart from the municipality, Plaintiff-Appellants' claims against ADA Greenwood are barred by absolute prosecutorial immunity, the *Younger* abstention doctrine, and lack of standing, and (4) Plaintiff-Appellants' claims against Greenwood are construed as against the state and fail under *Younger* and for lack of standing. (SPA-7).

Plaintiff-Appellants now appeal the decision of the District Court. Although the Appellants Notice of Appeal (A-969) claims to appeal "each and every part therein" of the lower Court's decision, a review of the Plaintiff-Appellants' brief reveals that their appeal is much more narrow in scope, only addresses issues concerning the New York State defendants, and does not raise or address any arguments regarding the decision of the District Court that granted summary judgement to ADA Greenwood and the County. Accordingly, the

County Defendant-Appellees respectfully submit that any arguments against ADA Greenwood or the County have been waived, and the appeal should be dismissed.

Should this Honorable Court reach the merits of the claims against ADA Greenwood, the decision of the lower Court should be affirmed as she is entitled to absolute prosecutorial immunity, as well as the additional basis found by Judge Feuerstein. Moreover, the claims against Greenwood in her official capacity, were properly construed as against the State and accordingly, the granting of summary judgement for the municipal County of Suffolk, must be affirmed as well.

STANDARD OF REVIEW

The Court reviews a district court's grant of summary judgment *de novo. See, e.g., Rubens v. Mason,* 387 F.3d 183, 188 (2d Cir.2004). Summary judgment is appropriate when the moving party shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Miller v. Wolpoff & Abramson, L.L.P.,* 321 F.3d 292, 300 (2d Cir.2003). The Court is required to resolve all ambiguities and draw all inferences in favor of the non-movant. *Nationwide Life Ins. Co. v. Bankers Leasing Assoc., Inc.,* 182 F.3d 157, 160 (2d Cir.1999). Summary judgment is appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

POINT I

PLAINTIFF-APPELLANTS HAVE WAIVED ANY ARGUMENTS AGAINST DEFENDANT-APPELLEES GREENWOOD OR THE SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE BY FAILING TO ADDRESS THEM IN THIS APPEAL

Although the Appellants Notice of Appeal (A-969) claims to appeal "each and every part therein" of the lower Court's decision, a review of the Plaintiff-Appellants' brief reveals that their appeal is much more narrow in scope, only addresses issues concerning the New York State defendants, and does not raise or address any arguments regarding the decision of the District Court that granted summary judgement to ADA Greenwood and the County. The arguments advance by the Plaintiff-Appellants in the instant brief are limited to arguments concerning the claims against the New York State DEC defendants. Other than noting that Plaintiff-Appellant Silva (now Taobi) was prosecuted by ADA Greenwood (Appellants Brief at * 6), and referencing a portion of testimony from Silva's criminal trial (Appellants Brief at *14), the brief is silent as to any claims against Greenwood or the District Attorney's Office, or more significantly, the determination by the District Court to grant summary judgment in their favor. By failing to raise any arguments in the instant appeal relating to ADA Greenwood or the Suffolk County District Attorney's Office, the Plaintiff-Appellants have waived those arguments, and respectfully the Court should not give them consideration. *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 184 (2d Cir. 2006),

citing, *Norton v. Sam's Club,* 145 F.3d 114, 117 (2d Cir.1998); *United States v. Jamison*, 838 F. App'x 622, 623 (2d Cir. 2021) (citing *Graves* and noting that an argument not raised on appeal is waived); *United States v. Colasuonno*, 697 F.3d 164, 171 (2d Cir. 2012) (applying general rule that argument not pressed on appeal "is therefore waived, and we will not consider it").

To the extent the Plaintiff-Appellants claim that the arguments advance in their brief regarding *Younger* abstention and *Ex Parte Young* are applicable to the County Defendant-Appellees, the Plaintiff-Appellants failed to raise these arguments below, and as such have waived them before this court. This was recognized by the Magistrate Judge below in his Report and Recommendation "the Court notes that Plaintiffs do not raise any new arguments with respect to *Younger* abstention and *Ex parte Young* in opposition to the County Defendants' Motion for Summary Judgment. (A-937, Report and Recommendation, Page 38, Footnote 25). "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Doe v. Trump Corp.*, 6 F.4th 400, 410 (2d Cir. 2021). Although the Court may exercise discretion to consider forfeited arguments where necessary to avoid a manifest injustice, "the circumstances normally do not militate in favor of an exercise of discretion to address ... new arguments on appeal where those arguments were available to the parties below and they proffer no reason for their failure to raise the arguments

below." *id;* citing *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008). The County Defendant-Appellees respectfully submit that Plaintiff-Appellants have waived any arguments against ADA Greenwood or the Suffolk County District Attorney's Office and the decision of the District Court granting summary judgments should be affirmed.

POINT II

ALL CLAIMS AGAINST DEFENDANT-APPELLEE GREENWOOD MUST BE DISMISSED AS SHE IS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY

Should this Court conduct a de novo review of the summary judgement determination below on the merits, all claims against ADA Greenwood must be dismissed, inter alia, on the grounds of absolute prosecutorial immunity. The basis for the Plaintiff-Appellants' claims against Assistant District Attorney Greenwood are solely based upon her role in the prosecution of defendant Silva in the criminal action in Southampton Town Justice Court. But for the following paragraph in the complaint, the complaint is void as to any conduct attributable to ADA Greenwood:

> This case is presently lodged and pending in the Southampton Town Justice Court as Case No. 17-7008 and is being prosecuted by Greenwood. Silva's attempt to obtain a voluntary dismissal by Greenwood was unsuccessful, and Silva's motion to dismiss for lack of jurisdiction was denied by that court. Over Silva's objection, that

case is presently scheduled for trial on August 30, 2018 at 9:00 am. (A-16)

It is well settled that prosecutors enjoy absolute immunity from civil suits for acts committed within the scope of their official duties where the challenged activities are not investigative in nature, but rather are "intimately associated with the judicial phase of the criminal process", including the decision whether to prosecute, and the presentation of the state's case. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976); see also *Jackson v. Cty. of Nassau*, No. 15-CV-7218(SJF)(AKT), 2016 WL 1452394, at *6 (E.D.N.Y. 2016), *adhered to on reconsideration*, No. 15-CV-7218(SJF)(AKT), 2016 WL 3093897 (E.D.N.Y. June 1, 2016). "It is by now well established that a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is immune from a civil suit for damages under §1983." *Shmueli v. City of New York,* 424 F.3d 231, 236 (2d Cir. 2005) (quoting *Imbler, supra*). Because "absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity," our "courts are encouraged to determine the availability of an absolute immunity defense at the earliest stage, preferably before discovery." *Flores v. Levy*, 07-CV-3753 JFB WDW, 2008 WL 4394681 (E.D.N.Y. Sept. 23, 2008) at*12 (E.D.N.Y. 2008) (quoting *Deronette v. City of New York*, No. 05-CV-5275, 2007 U.S. Dist LEXIS 21766 at *12

(E.D.N.Y. 2007), citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806 (1985) and *Imbler*, *id*. at 419 n. 13)).

Prosecutorial immunity from civil liability is broadly defined, "covering virtually all acts, regardless of the motivation, associated with the prosecutor's function as an advocate." *Hill v. City of New York*, 45 F.3d 653, 661 (2d Cir 1995). Among the conduct that has been held to be within the scope of their duties in initiating and pursuing a criminal prosecution are acts taken in preparation for those functions, including evaluating and organizing evidence for presentation at trial or to a grand jury (*Hill, id.,* citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606 (1993)), or determining which offenses are to be charged (*Ying Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir 1993); also protected by immunity, the decision whether or not to commence a prosecution (*Ying, id*.; see also, *Jackson v. Cnty. of Nassau*, 07-CV-0245 JFB AKT, 2009 WL 393640, , *4 (E.D.N.Y. Feb. 13, 2009)), and the decision to bring an indictment regardless of whether probable cause exists (*Coleman v. City of New York*, 08-CV-5276 DLI LB, 2009 WL 909742 (E.D.N.Y. Apr. 1, 2009), citing *Buckley*, 509 U.S. 259, 274 n. 5 (1993); see also *Pinaud*, *supra* at 1149 (district attorneys absolutely immune from claim for malicious prosecution and presentation of false evidence to the grand jury).

Motivation, whether it be malicious or negligent, is also irrelevant in deciding whether or not to apply absolute immunity. The concept of prosecutorial immunity from civil liability is broadly defined, covering "virtually all acts, regardless of motivation, associated with the prosecutor's function as an advocate." *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994). Once a court determines that a prosecutor was acting as an advocate, "a Defendant's motivation in performing such advocate functions as deciding to prosecute is irrelevant to the applicability of absolute immunity." *Shmueli, supra* at 237; *Flores*, *supra* at *14 (noting that the Ninth Circuit has interpreted *Imbler* to support absolute immunity even where a plaintiff alleges the prosecutor went forward with a prosecution he believed not to be supported by probable cause). So long as the actions taken by the prosecutor are associated with the prosecutor's role as an advocate, even allegations of intentional conspiracy to violate someone's constitutional rights are insufficient to overcome the cloak of immunity -- as stated by the Second Circuit in *Pinaud*, the "fact that such a conspiracy is certainly not something that is properly within the role of a prosecutor is immaterial, because the immunity attaches to the function and not to the manner in which it was performed." *Pinaud, id.* at 1148.

Clearly, Defendant-Appellee Greenwood's actions as alleged in the complaint fall squarely within the scope of a district attorneys' prosecutorial

capacity as an advocate, and are therefore protected by absolute prosecutorial immunity.

The Defendant-Appellees are cognizant that although the functional approach affords prosecutors absolute immunity for conduct associated with the judicial phase of the criminal process, activities characterized as administrative or investigative, may not be afforded such protection, and the individual defendant may only be entitled to qualified immunity. *Ying Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir. 1993); *Burns v. Reed*, 500 U.S. 478 (1991). However, the claims alleged by the Plaintiff-Appellants relate to conduct on the part of ADA Greenwood entirely associated with the judicial phase of the criminal process and within the scope of her duties in pursuing a criminal prosecution. There is nothing in the complaint to suggest that ADA Greenwood was involved in a determination that probable cause existed, or gave legal advice to the police on the propriety of investigative techniques, or were engaged in coercive interrogations of the plaintiffs. *See McCray v. City of New York*, 2007 WL 4352748 (S.D.N.Y. Dec. 11, 2007)(*citing Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Crews v. County of Nassau*, 2007 WL 4591325 (E.D.N.Y. Dec. 27, 2007). Nor does the Plaintiff-Appellants have any evidence that ADA Greenwood functionally acted in a role other than as a prosecutor in the judicial phase of the criminal process.

ADA Greenberg's alleged conduct is solely related to her role in the prosecution of Plaintiff-Appellant Silva. All of the alleged acts are within the scope of her pursuing a criminal prosecution and as such she is immune from a civil suit for damages. Accordingly the decision of the District Court granting summary judgment should be affirmed.

POINT III

THE CLAIM AGAINST DEFENDANT-APPELLEE GREENWOOD IN HER OFFICIAL CAPACITY MUST BE DISMISSED BASED UPON SOVEREIGN IMMUNITY

To the extent that Defendant-Appellant Greenwood is being sued in her official capacity as an Assistant District Attorney of Suffolk County, this claim must fail pursuant to the doctrine of State sovereign immunity. Actions taken in her prosecutorial role represent New York State's interests and are thus shielded from suit under the Eleventh Amendment. *Ying Jing Gan,* 996 F.2d at 536; ("[A] District Attorney is not an officer or employee of the municipality but is instead a quasi-judicial officer acting for the state in criminal matters") (internal quotation marks omitted); *Baez v. Hennessy,* 853 F.2d 73, 77 (2d Cir.1988) ("[w]hen prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the state not the county"), *cert. denied,* 488 U.S. 1014, 109 S.Ct. 805, 102 L.Ed.2d 796 (1989); see also, *Jackson v. County of Nassau,*, 2009 WL 393640 at *4 (E.D.N.Y. 2009).

Moreover, to the extent that the claim against the ADA Greenwood in her official capacity can be construed as a claim against the municipality County of Suffolk, they must be dismissed for the same reasons. Any claims against the County must be dismissed because in New York State a county cannot be held liable for the prosecutorial acts of a district attorney, because, as noted above, the DA acts in that capacity on behalf of the state, not the county. *See Ying Jing Gan, supra;* A district attorney's powers and duties in connection with the prosecution of a criminal proceeding are the same as those of an assistant State Attorney General appointed to handle such a prosecution. A county has no right to establish a policy concerning how the district attorney should prosecute violations of law. *Baez, supra* at 77. When making the decision of whether, and on what charges, to prosecute, the District Attorney acts in a State capacity. *Bellamy v. City of New York,* 914 F.3d 727, 759 (2d Cir. 2019).

Even if the claim against ADA Greenwood in her official capacity could be construed as a claim against the County of Suffolk, the decision of the District Court still must be affirmed. It is well settled that in order to recover against a government entity pursuant to §§1981, 1982 or 1983, a plaintiff must demonstrate facts that one of the County's customs and/or policies caused the subject constitutional violation. *Monell v. Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018 (1978). It is not enough to simply allege a municipal employee violated

plaintiff's rights – as there is no *respondeat superior* liability under the federal civil rights statutes embodied in §§ 1981 and 1982. A municipality may be held liable only for its own wrongs, that is, actions taken by the municipal employee pursuant to a municipal policy or practice. The complaint filed by the Plaintiff-Appellants is void of any such facts (sufficient or otherwise) to establish that a custom and/or policy of the County caused a violation of the plaintiffs' constitutional rights. Accordingly, any construed *Monell* claim against the County must be dismissed.

Claims Against the District Attorney's Office

Plaintiff-Appellants' claims against the "Suffolk County District Attorney's Office" must also be dismissed. The capacity of the District Attorney's Office to be sued is determined by New York law. *See* Fed.R.Civ.P. 17(b). "Under New York law, the [District Attorney's Office] does not have a legal existence separate from the District Attorney." *Gonzalez v. City of New York,* 1999 WL 549016, at *1 (S.D.N.Y. July 28, 1999). Correspondingly, the District Attorney's Office is not a suable entity. *See Steed v. Delohery,* No. 96 Civ. 2449, 1998 WL 440861, at *1 (S.D.N.Y. Aug. 4, 1998); *see also Jacobs v. Port Neches Police Dept.,* 915 F.Supp. 842 (E.D.Tex.1996) ("A county district attorney's office is not a legal entity capable of suing or being sued.").

POINT IV

PLAINTIFF-APPELLANT SILVA'S CLAIM IS BARRED BY THE DOCTRINE SET FORTH IN *HECK v. HUMPHREY*

Plaintiff-Appellant Silva's claim must also be dismissed because it is barred by the United States Supreme Court's holding in *Heck v. Humphrey,* 512 U.S. 477, 486-487, 114 S. Ct. 2364, 2372 (1994). When a verdict in plaintiff's favor in a civil case would undermine the integrity of his criminal conviction, a plaintiff may not proceed with such an action until he succeeds in setting the conviction aside. In *Heck*, the Supreme Court explained this principle as follows:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, *28 U.S.C. § 2254*. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.

Heck, supra at 486-487.

In the instant matter, Silva's claim arises out of conduct related to his criminal prosecution, more specifically, what he alleges is an unconstitutional conduct on the part of the New York State defendants in stopping and issuing him the certain summonses. Clearly a determination by a jury in this action that the

conduct alleged against the New York State defendants violated Silva's constitution rights would implicate the validity of his underlying conviction. *See*, *Channer v. Mitchell*, 43 F.3d 786, 787-88 (2d Cir. 1994); *Warren v. Fischl*, 674 F. App'x 71, 73 (2d Cir.), *cert. denied*, 138 S. Ct. 123, 199 L. Ed. 2d 75 (2017); see also *Harbison v. Corso, et al*, 16-CV-2919 (JMA) (E.D.N.Y., Jan. 24, 2018). [2]

[2] The Defendants-Appellees submit that we may raise the argument based on Heck v. Humphrey at this time in our responding brief before this Court, under the general rule that the appellee may seek to sustain a judgment on any grounds with support in the record. *Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.,* 38 F.3d 1279, 1285–86 (2d Cir. 1994), *citing Jaffke v. Dunham,* 352 U.S. 280, 281, 77 S.Ct. 307, 308–09, 1 L.Ed.2d 314 (1957) (per curiam) (cross-appeal not necessary to rule on admissibility of affidavit stricken by district court); *Arlinghaus v. Ritenour,* 622 F.2d 629, 638 (2d Cir.) (substituting grounds for affirmance without cross-appeal), *cert. denied,* 449 U.S. 1013, 101 S.Ct. 570, 66 L.Ed.2d 471 (1980); *Kennecott Copper Corp. v. Curtiss–Wright Corp.,* 584 F.2d 1195, 1206 (2d Cir.1978). Further, we submit that the Plaintiff-Appellants is precluded from raising or opposing this argument in their reply brief on this appeal. *McCarthy v. SEC,* 406 F.3d 179, 186 (2d Cir.2005) (it is well-settled that "arguments not raised in an appellant's opening brief, but only in his reply brief, are not properly before an appellate court even when the same arguments were raised in the trial court."

CONCLUSION

The Defendants-Appellees Jamie Greenwood and the Suffolk County District Attorney's Office, respectfully submit that the judgment of the District Court granting their motion for summary judgment should be affirmed in all respects.

Dated: Hauppauge, New York
September 24, 2021

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CERTIFICATE OF COMPLIANCE

This brief is in compliance with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) in that it contains 3,542 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Brian C. Mitchell
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