IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

VERLENE WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 06-2770-V
	)	
STEVEN OLIVER, individually,	)	
	)	
Defendant.	)	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Before the court are the following cross–motions for summary judgment: the October 30, 2007 motion of the plaintiff, Verlene Williams, for summary judgment and the October 30, 2007 motion of the defendant, Steven Oliver, for summary judgment. Williams brought this action under 42 U.S.C. § 1983 against Steven Oliver, an officer of the Memphis Police Department, in his individual capacity, alleging that Officer Oliver violated her constitutional rights under the Fourth Amendment under color of state law when he seized and towed her automobile without a warrant or probable cause and held it for ten days. The parties have consented to having all proceedings in this case conducted by a United States Magistrate Judge, including entry of judgment, pursuant to 28 U.S.C. § 636(c).

FACTS

The following facts are undisputed. On November 3, 2005, a theft occurred at Miguela's Clothing Store at 4615 Poplar Avenue in

Memphis, Tennessee. (Def.'s Mem. Ex. 1 at 1; Pl.'s Mot. Summ. J. ¶ 4.) Two black males entered the clothing store, grabbed large amounts of clothing, and fled in a vehicle driven by a black female. (Def.'s Mem. Ex. 1 at 20; Pl.'s Mem. Supp. 1.) Lawrence Hill, a security officer on duty at the time of the theft, verified that the suspects fled in a grey Pontiac Grand Am bearing license plate number TN #RZL374. (Def.'s Mem. Ex. 1 at 39.) A store clerk recorded the same license plate number. (Def.'s Mem. Ex. 4 at 1.) Officer Adam Mangrum, who was in charge of the theft investigation, verified the car was registered to the plaintiff, Verlene Williams, DOB 11/27/56, 8266 Meadow Vale Drive, Memphis, Tennessee. (Def.'s Mem. Ex. 1 at 39.; Pl.'s Mot. Summ. J. ¶ 5; Pl.'s Mem. Supp. 1.)

On November 14, 2005, Officers Mangrum and Oliver went to 8266 Meadow Vale Drive, observed the Pontiac Grand Am parked in the driveway of the residence, and interviewed Williams. (Def.'s Mem. Exs. 1 at 39, 4 at 1-2; Pl.'s Mot. Summ. J. ¶ 6; Pl.'s Mem. Supp. 1.) Williams advised the officers that she had three daughters and didn't know who was driving the vehicle that day. (Def.'s Mem. Exs. 1 at 39, 4 at 1-2.) Williams' daughter, Victoria Williams, admitted that she and her boyfriend had been in the car but denied any knowledge of any theft. (Def.'s Mem. Ex. 4 at 2.) With Williams' permission, the officers searched the car, its trunk, and Victoria's room to see if any stolen property was present. (*Id.*; Pl.'s Mot. Summ. J. ¶ 7; Pl.'s Mem. Supp. 2.) No stolen property

was found. (Pl.'s Mot. Summ. J. ¶ 8; Pl.'s Mem. Supp. 2; Def.'s Resp. to Pl.'s Mot. Summ. J. 3.)

Officer Oliver and Det. Littlejohn returned to Williams' home on November 22, 2005, to ascertain if the vehicle was still there. (Def.'s Mem. Exs. 1 at 40, 4 at 3.) Finding the vehicle at the location parked in the driveway of the residence, Officer Oliver requested a wrecker. (Def.'s Mem. Exs. 1 at 40, 4 at 3.) When the wrecker arrived on the scene, Officer Oliver completed a tow slip, gave it to the wrecker services, instructed the wrecker service to tow Williams' car to the city lot, and Williams' car was towed. (Def.'s Mem. Exs. 1 at 40, 4 at 3; Pl.'s Mot. Summ. J. ¶¶ 9, 10; Pl.'s Mem. Supp. 2.) Officer Oliver explained to Williams that her vehicle was being towed "because it was witnessed as being used in a felony theft." (Def.'s Mem. Exs. 1 at 40.) On December 1, 2005, Officer Mangrum, at the direction of Officer Oliver, contacted the city lot, requested the vehicle be released, and notified Williams that her vehicle had been released and she could pick it up. (Def.'s Mem. Ex. 1 at 40.)

Officer Oliver was an employee of the Memphis Police Department at all times pertinent. (Def.'s Mem. Ex. 4; Pl.'s Third Am. Compl. ¶¶ 6, 7.) Officer Oliver was instructed by Lt. Doreen Shelton to tow the vehicle. (Def.'s Mem. Exs. 2, 4 at 3; Pl.'s Third Am. Compl. ¶ 10.) In theft investigations where a car is involved, it is the policy of the Memphis Police Department to tow

the suspect vehicle to the city lot to be processed for fingerprints or other evidence that may lead to the identification and arrest of a suspect. (Def.'s Mem. Ex. 2.)

ANALYSIS

A. Standard for Summary Judgment

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). The party that moves for summary judgment has the burden of showing that there are no genuine issues of material fact at issue in the case. *LaPointe,* 8 F.3d at 378. This may be accomplished by pointing out to the court that the nonmoving party lacks evidence to support an essential element of its case. *See Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

In response, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 339-40 (6th Cir. 1993). "[T]he mere

existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

In deciding a motion for summary judgment, "this [c]ourt must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993)(quoting *Anderson*, 477 U.S. at 251-52). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. Finally, a district court considering a motion for summary judgment may not weigh evidence or make credibility determinations. *See Adams v. Metiva*, 31 F.3d 375, 379 (6th Cir. 1994).

Cross–motions for summary judgment do not guarantee entry of summary judgment for one of the movants. Each motion must be considered on its own merits, and both may be denied. *Shook v.*

United States, 713 F.2d 662, 665 (11th Cir. 1983).

B. Oliver's Motion for Summary Judgment

Officer Oliver has raised qualified immunity as an affirmative defense in his amended answer and now seeks summary judgment on the basis of qualified immunity.

The doctrine of qualified immunity for government officials was articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the Supreme Court held:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow, 457 U.S. at 818. The question "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighten*, 483 U.S. 635, 639 (1987)(citations omitted). The relevant question is "whether a reasonable officer could have believed [Oliver's warrantless towing of Williams' vehicle] to be lawful, in light of clearly established law and the information the [towing] officer [] possessed." *Id*. at 641. Officer Oliver's subjective belief about the legality of the towing is irrelevant. *Id.*

In *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992),

the Sixth Circuit outlined the plaintiff's burden on a motion for summary judgment with respect to the issue of qualified immunity:

> The plaintiff must effectively pass two hurdles when facing a defendant on summary judgment who claims qualified immunity. First, the allegations must "state a claim of violation of clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). Second, the plaintiff must present "evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Id.*

Russo v. City of Cincinnati, 953 F.2d at 1043. With regard to whether a claim states a violation of a "clearly established law," the Supreme Court stated: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. The right the official is alleged to have violated must have been “clearly established” in a more particularized sense, not just a general, abstract right. *Id.*, 483 U.S. at 640.

Qualified immunity is evaluated under a three-step analysis: (1) whether a violation of a constitutional right occurred; (2) whether the constitutional right was “clearly established” at the time of the actions in question; and (3) whether the official’s conduct was “objectively reasonable” in light of the clearly established right. *Dickerson v. McClellan*, 101 F.3d 1151, 1157-58 (6th Cir. 1996). “The burden is on the plaintiff to allege and prove that the defendant official violated a clearly established constitutional right.” *Buckner v. Kilgore*, 36 F.3d 536, 539 (6th

Cir. 1994). "Summary judgment is not appropriate if there is a genuine factual dispute relating to whether the defendants committed acts that allegedly violated clearly established rights." *Dickerson*, 101 F.3d at 1158 (citing *Buckner*, 36 F.3d at 540). A police officer is entitled to qualified immunity from liability for his discretionary actions if either (1) his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or (2) it was objectively reasonable for him to believe that his actions were lawful at the time of the challenged act. *Cerrone v. Brown*, 246 F.3d 194, 199 (2nd Cir. 2001).

Williams has alleged that Officer Oliver's conduct while acting under color of state law violated the Fourth Amendment. The Fourth Amendment guarantees the right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. The Fourth Amendment also requires probable cause for the issuance of a warrant. *Id.* Although the Fourth Amendment does not literally require a warrant and probable cause for each seizure, the Supreme Court has imposed a warrant and probable cause requirement for each seizure unless an exception applies. *Katz v. United States,* 389 U.S. 347, 357 (1967). "[T]he most basic constitutional rule in this area [the Fourth Amendment] is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se

unreasonable . . . subject only to a few specifically established and well delineated exceptions.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971)(quoting *Katz*, 389 U.S. at 357. Thus, it was clearly established at the time of this incident that a Fourth Amendment "seizure" of property without a warrant and without probable cause violates the Fourth Amendment, unless an exception applies.

A Fourth Amendment "seizure" of property occurs where there was "some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Officer Oliver's towing of Williams' automobile and retention of her automobile at the police impound lot constitutes a seizure under the Fourth Amendment. Deciding to tow a vehicle is a discretionary act within a police officer's official capacity. *Calderon v. Burton*, 457 F. Supp. 2d 480, 484 (S.D. N.Y. 2006).

Only "unreasonable" seizures are proscribed by the Fourth Amendment. Probable cause is a reasonableness standard for warrantless searches and seizures. *Carroll v. United States,* 267 U.S. 132, 155-56 (1925). The undisputed facts reveal that the warrantless seizure of Williams' automobile was supported by probable cause. Two witnesses had positively identified Williams' automobile as the getaway vehicle used in the felony theft of Miguela's Clothing Store on November 3, 2005. Thus, it was the

instrumentality of a crime. Williams' daughter had admitted that she and her boyfriend were in the vehicle even though she had denied any knowledge of a theft. Although no stolen items were found in the initial search of the vehicle, it had not been tested for fingerprints, and therefore there was probable cause to believe that evidence of a crime would be found in the vehicle.

The next question is whether an exception to the Fourth Amendment warrant requirement applied. One of the "well-delineated exceptions" to the warrant requirement is the so-called "automobile exception." The seminal case creating this exception is *Carroll v. United States*, 267 U.S. 132 (1925). In *Carroll*, the Supreme Court recognized that a warrantless search and seizure of an automobile on a public highway is justified because of its mobility if the officer has probable cause to believe that the automobile contains contraband. *Carroll*, 267 U.S. at 153-54. In *Chambers v. Maroney*, the Supreme Court, relying on *Carroll*, found no Fourth Amendment violation when the police stopped a vehicle which matched the description of a car seen leaving the scene of a robbery, seized it, towed it to the police station, and searched it, without a warrant, because there was probable cause to believe that the vehicle contained guns and evidence of the robbery and exigent circumstances existed - the car was movable, the occupants were alerted, and the car's contents may never have been found again if a warrant was obtained. *Chambers v. Maroney*, 399 U.S. 42, 51

(1970). The Court reasoned that where police may lawfully stop and search a car under *Carroll*, they can lawfully seize it and search it later at the police station. *Id.* at 51-52.

In *Coolidge v. New Hampshire*, however, the Supreme Court found the warrantless seizure of an automobile parked in the driveway of a murder suspect's house at the time of his arrest within his house and subsequent search at the police station violated the Fourth Amendment because no exigent circumstances existed and the automobile exception to the warrant requirement as enunciated in *Carroll* was inapplicable. *Coolidge v. New Hampshire*, 403 U.S. 443, 463 (1971). In *Coolidge*, the police had known for some time (about four weeks) of the probable role of the car in the murder, Coolidge had known he was a suspect but had been cooperative and had not made any attempt to flee, Coolidge had had ample time to destroy any evidence in the car, on the night in question the car was properly parked in his driveway, the car was not being used for any illegal purpose on the night of the seizure, and when he was arrested, Coolidge did not have access to the car. *Coolidge*, 403 U.S. at 460. The Court held, "In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant,' . . . and the 'automobile exception,' despite its label, is simply irrelevant." *Coolidge*, 403 U.S. at 462 (citations omitted).

In 1985, however, the Supreme Court in *California v. Carney*,

471 U.S. 386 (1985), eliminated the "exigency" requirement, upholding the warrantless search of a motor home. The Court recognized that although ready mobility was the original justification for the automobile exception, a diminished expectation of privacy in a mobile vehicle also justified the automobile exception for searches of vehicles. *Carney*, 471 U.S. at 391. The Court relied "on the inherent mobility of the motor home to create a conclusive presumption of exigency." Id. at 404 (Stevens, J., dissenting). Thus, after *Carney*, "probable cause *alone* suffices to justify a warrantless search of a vehicle lawfully parked in a public place." *United States v. Bagley*, 772 F.2d 482, 491 (9th Cir. 1985).

Following the Supreme Court's decision in *Carney*, the Ninth Circuit, upholding the warrantless seizure of a robbery getaway car parked on the public street, reasoned that "if the existence of probable cause alone justifies the warrantless search of vehicle parked in a public place, certainly a warrantless seizure of such a vehicle, based only on probable cause, also falls within the automobile exception." *Id.* The Sixth Circuit, likewise, in *Autoworld Specialty Cars, Inc. v. United States*, under the automobile exception after *Carney*, upheld the warrantless seizure of five foreign automobiles from an importer's showroom and of one automobile parked in a public driveway behind the showroom because the cars were readily mobile and the officers had probable cause to

associate them with criminal activity. *Autoworld Specialty Cars, Inc. v. United States*, 815 F.2d 385, 389 (6th Cir. 1987); *see also United States v. Cooper*, 949 F.2d 737, 747 (5th Cir. 1991)(holding that "the police may seize a car from a public place without a warrant when they have probable cause to believe that the car itself is an instrument or evidence of crime").

The only remaining question is whether a driveway of a private residence is a public place. While there is no bright line rule on the issue, courts look to the reasonable expectations of privacy that a person may expect in a driveway. *See Roche v. City of Dallas*, No. 3-012-CV-0938, 2004 WL 358073 (N.D. Tex., Jan. 27, 2004)(summarizing Texas cases and finding because of the ambiguity on the categorization of a private driveway officers acted reasonably in arresting defendant for public drunkenness). The Sixth Circuit has upheld the warrantless search of a motor home that was parked in a private driveway, noting that the driveway was connected to a public street. *United States v. Markham*, 844 F.2d 366, 369 (6th Cir. 1987). The Fourth Circuit has also upheld the search and seizure of a car in a driveway when probable cause existed. *See United States v. Brookins*, 345 F.3d 231, 233 (4th Cir. 2003) (upholding a warrantless search and seizure of a car parked in a driveway when the police had probable cause to believe the car contained contraband); *Id.* at 237 n.8 (declining to adopt a bright-line rule precluding warrantless searches on private

property under all circumstances). The reasonable expectation of privacy has continued to be a factor that courts have considered in determining whether seizures from private driveways are allowed. *See United States v. Rogers*, 264 F.3d 1, 5 (1st Cir. 2001) (stating that a person "does not have a reasonable expectation of privacy in a driveway that was visible to 'the occasional passerby'"); *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975) (A driveway is only a "semiprivate" area, and "[t]he test in each case should be that of reasonableness, both of the possessor's expectations of privacy and of the officers' reasons for being on the driveway.").

In this case, Williams' expectation of privacy in the driveway would not have been so great as to preclude a warrantless search. If the car had been parked in the street connected to the driveway, there would be no expectation of privacy. It is illogical to say that moving the vehicle only a minimal distance into an un-gated, open driveway where the vehicle remains in plain view, increases the expectation of privacy to a level that precludes a warrantless search and seizure based on probable cause. Because Williams could not have had any reasonable expectation of privacy in her open driveway, it was reasonable for the officers to act in the manner they did. At the very least, it was not clearly established at the time of the incident that Williams' Fourth Amendment rights were violated by the warrantless towing of her automobile from her driveway when there was probable cause to believe that her

automobile was the instrumentality of a crime and contained evidence of a crime. Therefore, there is no factual dispute as to whether Officer Oliver's conduct was a violation of a clearly established right.

Even if it is assumed that the towing of Williams' vehicle without a warrant was a violation of a clearly established right, Officer Oliver would, nevertheless, still be entitled to qualified immunity because his decision to tow the vehicle without first obtaining a warrant was objectively reasonable. Law enforcement officers "who reasonably but mistakenly conclude that probable cause is present" are entitled to qualified immunity. *Anderson*, 483 U.S. at 641.

In light of the facts known to Officer Oliver, a reasonable officer would have believed that probable cause existed to seize Williams' vehicle. As previously stated, it had been positively identified as being used in a felony theft. In addition, a reasonable officer could have believed it was lawful to tow a vehicle positively identified as being used in a felony theft without a warrant. Officer Oliver has submitted the affidavit of Lt. Jasper Clay in support of his motion for summary judgment on the issue of qualified immunity. Lt. Clay's affidavit states that he is employed by the Memphis Police Department as a supervisor for the General Assignment Bureau. Lt. Clay further states that he overheard Lt. Doreen Shelton direct Officer Oliver to tow the

vehicle that had been positively identified as the vehicle used to commit the felony theft in the case that Officer Mangrum was working. Lt. Clay stated that "[i]n situations like this, the suspect's vehicle is towed to the lot to be processed with the hope of obtaining evidence or fingerprints that may lead to the identification and arrest of a suspect." (Def.'s Mem. Ex. 2.)

By coming forward with proof of other officer's understanding of the towing policy with regards to automobiles used in a felony theft and that he was instructed by his superior to tow Williams' automobile without a warrant, Officer Oliver has met his initial burden of showing the absence of a genuine issue whether the towing was reasonable under the Fourth Amendment. In response, Williams has failed to come forward with any affidavit or other sworn proof rebutting Lt. Clay's description of the Memphis Police Department's informal policy on towing vehicles used in felony theft cases. Williams has therefore failed to produce sufficient proof from which a reasonable person could justifiably infer that Officer Oliver's conduct in towing Williams' vehicle without a warrant was not objectively reasonable. Moreover, in light of the ambiguity among courts as to the characterization of the driveway of a private residence as a public place and the existing case law on the seizure of vehicles identified as instrumentalities of crimes, it was objectively reasonable for an officer to believe that he could seize a vehicle that had been positively identified as used

in a crime from the driveway of a private residence without a warrant.

Accordingly, Officer Oliver is entitled to qualified immunity, and his motion for summary judgment is granted.

C. Plaintiff's Motion for Summary Judgment

For the reasons supporting the granting of the defendant's summary judgment motion as set out above, the plaintiff's motion for summary judgment is denied.

CONCLUSION

No genuine factual issues exist as to whether Officer Oliver committed acts which violated clearly established Fourth Amendment rights, and, concomitantly, whether Officer Oliver's conduct was "objectively reasonable" in light of those rights. For these reasons, therefore, summary judgment on the issue of qualified immunity in favor of the defendant Officer Oliver in his individual capacity is appropriate. Defendant's motion for summary judgment on the issue of qualified immunity is granted, and the plaintiff's motion for summary judgment is denied.[1]

IT IS SO ORDERED this 12th day of February, 2008.

s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

[1] Because the court grants defendant's motion for summary judgment, all other motions are moot.