

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 11-1647

HANS KEIL

Petitioner

v.

**Glen Triveline et al,
Respondent**

PETITION FOR REVIEW

Appeal from the Decision of the District Court

APPELLANT'S OPENING BRIEF

W. MICHAEL SHARMA-CRAWFORD

Sharma-Crawford, Attorneys at Law, LLC

7208 W. 80th, Ste. 202

Overland Park, KS 66204

913-385-9821 phone

913-385-9964 fax

Attorney for Appellant-Petitioner

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

On September 9, 2008, Hans Keil, a United States Citizen, was arrested by agents of U.S. Immigration and Customs Enforcement. (I.C.E.) Mr. Keil was arrested and detained as an “arriving alien.” He was issued a Notice to Appear and a Warrant for Arrest of an Alien. He was booked into jail as a non-citizen detained by I.C.E.

On September 10, 2008, in the Western District of Missouri, Mr. Keil was charged by information with falsely claiming to be a citizen of the United States contrary to 18 U.S.C. §911 and improper use of a U.S. passport contrary to 18 U.S.C. §1544. See WDMO 08-2266-JCE-1. This case was dismissed on December 12, 2008.

Hans Keil filed a FTCA claim and an action for Constitutional violations against the individual agents (*See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971))(WDMO 09-3417, *Bivens*; 10-4090 FTCA) These cases were consolidated under 09-3417. Discovery regarding qualified immunity was granted and depositions of the agents were taken.

Both Respondents and Petitioner filed motions for summary judgment. The District Court held that Respondent’s had probable cause to arrest Petitioner for the criminal charges for which he had been charged by information. The District Court held that this justification for a lawful arrest obviated the constitutional violations alleged in both cases for arresting Petitioner on immigration charges

Petitioner would ask for 15 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

There are no non-governmental corporate parties to these proceedings.

TABLE OF CONTENTS

	Page
SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT	2
DISCLOSURE STATEMENT	3
TABLE OF AUTHORITIES	5
STATEMENT OF JURISDICTION	6
STATEMENT OF THE ISSUES	7
STATEMENT OF THE CASE AND FACTS	8
1. Nature of the Case	8
2. Disposition Below	8
3. Statement of the Facts	8
INTRODUCTION AND SUMMARY OF THE ARGUMENT	13
STANDARD OF REVIEW	13
ARGUMENT	15
1. Whether the District Court erred in dismissing the Petitioner's complaint by finding that Respondent's had probable cause to arrest him.	
A. The Law	15
B. Probable Cause	16
C. Jury Instructions	17
D. Analysis of Jury Instructions	18
CONCLUSION	21
CERTIFICATE OF COMPLIANCE	22
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Brandt v. Davis</i> , 191 F.3d 887, 891 (8th Cir.1999)	14
<i>Devenpeck v. Alford</i> , 543 U.S. 146, (2004)	15
<i>Matter of Villanueva</i> , 19 I&N 101 (BIA 1984)	16
<i>McCabe v. Parker</i> 608 F.3d 1068 (C.A.8 2010)	15
<i>United States v. Henderson</i> , 613 F.3d 1177 (8th Cir.2010)	17
<i>United States v. Jones</i> , 535 F.3d 886 (8th Cir.2008)	17
<i>United States v. Mendoza</i> , 421 F.3d 663 (8th Cir.2005)	17, 19
<i>United States v. Parish</i> , 606 F.3d 480 (8th Cir.2010)	17
<i>United States v. Quiroga</i> , 554 F.3d 1150, 1154 (8th Cir.2009)	14
<i>U.S. v. Webster</i> 625 F.3d 439 (C.A.8 2010)	17
Statutes	Page(s)
18 U.S.C. §911	9, Passim
18 U.S.C. §1544	9, Passim
22 U.S.C. §2705	9, Passim
28 U.S.C. §1331	7
28 U.S.C. §1346(a)(2)	7
28 U.S.C. §2671	7
28 U.S.C. §1291	7
Other	Page(s)
Ninth Circuit Model Jury Instruction § 8.49 (2010)	18

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 USC §§1331, 1346(a)(2), §2671. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in dismissing the Petitioner's complaint by finding that Respondent's had probable cause to arrest him.

McCabe v. Parker 608 F.3d 1068 (C.A.8 2010)

U.S. v. Webster 625 F.3d 439 (C.A.8 2010)

Matter of Villanueva, 19 I&N 101 (BIA 1984)

STATEMENT OF THE CASE AND FACTS

1. Nature of the Case

The District Court held Respondents had probable cause to arrest Petitioner pursuant to 18 U.S.C. §§911 and 1544. This conclusion was erroneous because Petitioner was, at the time of his arrest, a U.S. Citizen by operation of law so he could have neither falsely claimed to be a citizen nor misused his lawfully issued U.S. Passport to demonstrate his status as a U.S. Citizen.

2. Disposition Below

Petitioner filed both an action against the agents as individuals and an action under the Federal Tort Claims Act. Following discovery and briefing the District Court granted Respondent's Motions for Summary Judgment. The District Court held that Petitioner's Fourth Amendment claim could not survive either against the individual defendants or the United States because the Respondents had probable cause to arrest Petitioner. This appeal followed.

3. Statement of the Facts

Hans Keil (Petitioner) was a United States Citizen at birth. Def. App'x at 62-63. His Grandfather was granted citizenship by the State of Illinois in 1896. That citizenship was passed to Petitioner's father and ultimately on to Petitioner. Although this genealogical acquisition of citizenship was not discovered until October 2008, at the time of Petitioner's arrest he was also a citizen by operation of law. See 22 U.S.C. §2705.

On August 9, 1961, Petitioner was issued a “letter of identity” from the “acting Governor of American Samoa identifying Petitioner as a citizen of the United States Pltf App’x at P7. Petitioner’s brother and mother were also issued similar “letters of identity.” All three letters of identity have the word “national” struck out and typed above is “Citizen.” Pltf App’x at P8-10.

Petitioner entered the United States in August 1961 using the “letter of identity” to gain admission. Pltf Dec ¶ 6 (Pltf App’x at P1 & 6). Petitioner joined the U.S. Airforce using the “letter of identity” and swore an oath of allegiance to the United States. Pltf Dec ¶ 11, 12 (Pltf App’x at P2). Petitioner served 4 years from 1961 – 1965 in the U.S. Airforce and was honorably discharged. Pltf Dec. ¶ 14-16 (Pltf App’x at P2) Following his service in the U.S. Airforce, Petitioner was validly issued U.S. Passports beginning in 1967. Agent Barnhart testified that based on his investigation all of Petitioner’s passports were validly issued. Barnhart Depo Pg 45-46 Ln 20-22 & Ln 1.

Respondents were investigating Samoan dancer’s visas when they first met Petitioner. As their investigation continued they discovered Petitioner had never completed his citizenship applications with then INS. During an interview of Petitioner they believed that he told them his father was German and his mother was Chinese. Petitioner’s Father is of German descent, but is a U.S. Citizen. Petitioner’s mother is not Chinese. Respondents knew this because they interviewed her in California at her house. (Pltf App’x at P20)

Despite this lack of probable cause Respondent's made plans to arrest Petitioner on September 9, 2008, pursuant to an administrative immigration warrant. Pltf App'x at P11-18 On September 9, 2008, Petitioner was walking with one of the Samoan Dancers. Pltf Dec. ¶ 36 (Pltf App'x at P3) Respondent Hamilton and Barnhart came up to Petitioner in the parking lot. Barnhart Dec. ¶ 19; Hamilton Dec. ¶ 13. Respondent Hamilton told Petitioner you are under arrest for being an illegal alien. Pltf Dec. ¶ 39 (Pltf App'x at P3). Petitioner was arrested pursuant to that administrative warrant by Respondent Hamilton. Hamilton Dec. ¶ 16; Pltf App'x at P17. Petitioner was taken back to the ICE Office in Stratford, Mo by Respondent's Barnhart and Foster. Foster Dec. ¶ 47 Petitioner was served with the warrant and a Notice to Appear in Immigration Court. Foster Dec. ¶48 Petitioner was booked into the Christian County Jail solely on the administrative warrant Foster Dec. ¶ 55

Respondent Foster testified that Petitioner was arrested as an "illegal alien" with full knowledge that he was in possession of a facially valid passport. Foster Depo. Pg 47 Ln 15-20. Respondents Foster, Spinella and Hamilton & Barnhart testified that they knew prior to his arrest Petitioner was in possession of a facially valid U.S. Passport Foster Depo. Pg 43 Ln 5-10; Barnhart Depo Pg 58 Ln 10; Spinella Depo Pg 22 Ln 18-19; Hamilton Depo Pg 20 Ln 16. Respondents Foster, Hamilton and Spinella testified that they knew that a person in possession of a facially valid U.S. Passport is considered a U.S. Citizen. Foster Depo, Pg 48 Ln

18-24; Hamilton Depo. Pg 13-14 Ln 24-25 & 1-21; Spinella Depo Pg 28-9 Ln 25 & 1-4.

The administrative arrest warrant drafted by Respondent Foster was facially invalid as it lists Petitioner's status as an alien. Def App'x at 32 An administrative immigration warrant cannot be used to arrest a U.S. Citizen. Spinella Depo. Pg. 27 Ln 13-16. Petitioner's passport was not revoked at the time of his arrest. Def. App'x at 49. Respondent Barnhart testified he did not revoke Petitioner's passport, he merely seized it for evidence. Respondent Barnhart's Depo. Pg 11-12 Ln 17-22 & 1-5; Pg 38 Ln 14.

Respondent Spinella testified that he believed when Respondent Barnhart took Petitioner's passport away from him that Petitioner ceased to be a U.S. Citizen. Barnhart Depo Pg 29 Ln 9-22. Respondent Hamilton testified that he believed when Respondent Barnhart took Petitioner's passport away from him that Petitioner ceased to be a U.S. Citizen, because that is what Respondent Spinella told him. Hamilton Depo Pg. 20 Ln 3-13. Respondent Barnhart testified that he never told Respondents Foster, Hamilton or Spinella that Petitioner would not longer be a citizen of the United States when he seized Petitioner's passport. Barnhart Depo Pg. 10 Ln 14-20

Prior to Petitioner's arrest Respondent Barnhart did not conduct an investigation into why Petitioner was originally issued a U.S. Passport in 1967.

Barnhart Depo. Pg 31-32 Ln 13-22; 1-3; Pg 81-82 Ln 7-22; 1-16; Pg 88-89 Ln 16-22, 1-2

Following the dismissal of the criminal case, Petitioner filed two civil suits one against the individual defendants the other against United States. Following discovery, and briefing the District Court Judge granted Respondents Motion to Dismiss.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The District Court held that Respondents had probable cause to arrest Petitioner pursuant to 18 U.S.C. §§911 and 1544. The Court opined since Petitioners probable cause to arrest for a criminal violation they did not violate Petitioner's constitutional rights. The District Court is in error. Respondents did not have probable cause to believe Petitioner had falsely claimed to be a U.S. Citizen because they knew he was a citizen by operation of law and had been one for over 40 years at the time of his arrest.

STANDARD OF REVIEW

“The district court's conclusion there was probable cause to support the arrests is reviewed de novo. *United States v. Quiroga*, 554 F.3d 1150, 1154 (8th Cir.2009).” “We review a grant of summary judgment de novo, viewing the record in the light most favorable to the non-moving party.” *Brandt v. Davis*, 191 F.3d 887, 891 (8th Cir.1999).

ARGUMENT

1. THE DISTRICT COURT ERRED IN HOLDING RESPONDENT'S HAD PROBABLE CAUSE TO ARREST PETITIONER

A. The Law

Respondent's lacked any probable cause to arrest Petitioner pursuant to 18 U.S.C. §§911 and 1544.

Lack of probable cause is a necessary element of all the claims McCabe and Nelson brought arising from the allegedly unlawful arrests. See *Devenpeck v. Alford*, 543 U.S. 146, 152, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004) (“[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed.”); *McCabe v. Parker* 608 F.3d 1068, 1075(C.A.8 2010)

18 U.S.C. §911 states: “Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.”

18 U.S.C. §1544 states in pertinent part: “Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports.”

In the instant matter Respondents alleged and the District Court agreed that Petitioner “falsely represent[ed]” his status as a United States Citizen which violated the conditions or restrictions on the passport.

Petitioner was a United States Citizen at birth. Furthermore, and more relevant to the facts at hand, Petitioner was a United States Citizen by operation of law.

Petitioner had been first issued a U.S. Passport in 1967. The passport issued to Petitioner “shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction” See 22 U.S.C. 2705. This was well known to Respondents as the Board of Immigration Appeals has a published decision on the effect of a U.S. Passport. *See Matter of Villanueva*, 19 I&N 101 (BIA 1984)(holding: “[u]nless void on its face, a valid U.S. passport issued to an individual as a citizen of the United States is not subject to collateral attack in administrative immigration removal proceedings but provides conclusive proof of such person’s United States Citizenship.”) Petitioner’s passport in his possession at the time of his arrest, was not void on its face, it was valid.

Petitioner received U.S. Passports for 41 years. Petitioner’s passports had all been validly issued. At the time of his arrest, Petitioner was in possession of a validly issued U.S. Passport, thus at the time of his arrest and for the 41 years prior to his arrest, Petitioner was a U.S. Citizen by operation of law.

Despite Respondents stated disbelief that Petitioner should not have initially been issued a U.S. passport, they could not ignore that at the time of his unlawful

arrest he was in possession of one that had been validly issued. Their opinion could not change the function of the law.

Respondents knew Petitioner was in possession of a validly issued U.S. Passport at the time of his arrest. Respondents knew that a person in possession of a U.S. Passport was legally a United States Citizen. Therefore, on September 8, 2008, Respondent's knew Petitioner was not an alien, they knew he was legally a U.S. Citizen and thus could not have misrepresented his status.

B. Probable Cause

This case is about probable cause to arrest. Respondents did not have probable cause to arrest Petitioner.

“Probable cause to make a warrantless arrest exists when, considering all the circumstances, police have trustworthy information that would lead a prudent person to believe that the suspect has committed or is committing a crime.” *United States v. Parish*, 606 F.3d 480, 486 (8th Cir.2010). In making this determination, “[l]aw enforcement officers have substantial latitude in interpreting and drawing inferences from factual circumstances.” *United States v. Henderson*, 613 F.3d 1177, 1181 (8th Cir.2010) (internal quotation marks and citation omitted). “Because probable cause requires only a probability or substantial chance of criminal activity, rather than an actual showing of criminal activity, the police need not have amassed enough evidence to justify a conviction prior to making a warrantless arrest.” *United States v. Mendoza*, 421 F.3d 663, 667 (8th Cir.2005) (citation omitted); *see also United States v. Jones*, 535 F.3d 886, 890 (8th Cir.2008). *U.S. v. Webster* 625 F.3d 439, 442(C.A.8 2010)

To have probable cause to believe Respondent was committing either 18 U.S.C. §911 or §1544, Respondents would have to have evidence Petitioner had committed elements of those crimes.

C. Jury Instructions

The District Court relied on 9th Circuit Jury instructions to obtain the elements of §911. The Ninth Circuit Model Criminal Jury Instructions provide the elements of § 911. The government must prove:

First, the defendant directly and falsely represented himself to be a citizen of the United States;

Second, the defendant was not a citizen of the United States at that time;

Third, the defendant made such false representation willfully, that is, the misrepresentation was voluntarily and deliberately made; and

Fourth, the false representation was made to someone who had good reason to make inquiry into defendant's citizenship status.

Ninth Circuit Model Jury Instruction § 8.49 (2010).

The District Court seizes on Respondents statement that Petitioner admitted to not being born in the U.S., having a German father and a Chinese Mother as sufficient grounds to believe that Petitioner was not a U.S. Citizen. The District Court also opines that the fact that Petitioner filed and never finished two applications for citizenship, in conjunction with Petitioner's other statements "would warrant a prudent person in believing Keil was falsely representing U.S. citizenship and that he was not a U.S. citizen." The District Court is in error.

At the beginning, the District Court forgets that Petitioner is charged with falsely representing himself to be a U.S. Citizen on September 9, 2008. At that point in time he was in possession of validly issued U.S. passport. That is an

uncontroverted fact. Thus, at that moment in time, and for the forty years prior, Petitioner was, by operation of law, a citizen of the United States. See 22 U.S.C. 2705.

On that fateful day in September, Petitioner was a U.S. Citizen. Even had Petitioner not been a citizen by birth, on that day he was also a citizen by virtue of his possession of a U.S. Passport. It was not until 17 days later when the passport was revoked was its mantle of citizenship removed from Petitioner. Moreover, Respondents all admitted they knew a person in possession of a validly issued U.S. passport was legally a U.S. Citizen. They also admitted that Petitioner was in possession of a validly issued U.S. passport. Respondents knew that at the time of his arrest, at the time of his claim to citizenship, Petitioner was by law a U.S. citizen, and his statements were not false.

D. Analysis of Jury Instructions

Therefore, in an analysis based on uncontroverted facts of this case in light of the 9th Circuit jury instructions; on September 9, 2008, (1) Respondents knew Petitioner was not falsely representing himself to be a citizen of the United States; (2) Respondents knew Petitioner was lawfully a citizen of the United States; (3-4) Respondents knew Petitioner did not make a false representation.

In light of Petitioner's legal status as a U.S. Citizen coupled with the fact that Respondents knew Petitioner was lawfully a U.S. Citizen, Respondents cannot

show “only a probability or substantial chance of criminal activity.” *Mendoza* at 667. Respondent’s knew it was legally impossible for Petitioner to have committed either crime.

Since Petitioner could not have made a “false” claim to citizenship due to his legal status as a U.S. citizen, he could not have used a passport in violation of any “conditions or restrictions.”

Respondent’s may have had their own reason to believe that Petitioner should not have been issued passports for the last 40 years, but that does not change the fact that the passports were validly issued. Nothing changes the fact that on September 9, 2008 Respondents knew he was a U.S. Citizen.

It was uncontroverted Respondent’s knew he had the passport. It was uncontroverted that Respondent’s knew his possession of the passport made him a citizen by law. It was uncontroverted that Respondent’s knew the passport was validly issued. Therefore it is uncontroverted that Respondent’s knew he was not falsely claiming to be a U.S. Citizen when he was arrested, because he was a U.S. Citizen when he was arrested. There could be no probable cause of criminal activity because the operation of law eliminated any chance that Petitioner could violate either statute.

The District Court erred in his decision because he did not analyze the facts in light of the operation of law. The District Court credited Respondents with the belief that Petitioner may not be legally entitled to the passport he possesses.

However, the Court forgot that the mere fact Petitioner possesses the passport makes him a citizen. Petitioner could not make a false statement regarding his citizenship, because the law made him a citizen.

Respondents knew Petitioner's possession of the U.S. passport made him a citizen they were just willfully blind. Willful blindness coupled with wishful thinking does not equal probable cause.

Respondents attempted to explain their logic but it is unavailing especially in light of Respondent Barnhart's averment of their logic. Respondents Hamilton and Spinella stated that they believed that if Respondent Barnhart seized Petitioner's passport, then Petitioner ceased to be a U.S. Citizen.

Respondent Barnhart testified that he never told or inferred that that was the legal result of his seizure of Petitioner's passport. There is absolutely no factual basis or legal authority for this idea. Respondent Barnhart testified that he only seized Petitioner's passport as evidence and that he did not revoke Petitioner's passport. At the time of his arrest Petitioner was still legally a United States Citizen. There is no reasonable explanation for Respondent's arrest of Petitioner and Respondents reliance on this theory is objectively unreasonable.

CONCLUSION

Wherefore Petitioners prays that this Court grant their Petition for Review.

Respectfully Submitted:

s/W. Michael Sharma-Crawford

W. MICHAEL SHARMA-CRAWFORD

Sharma-Crawford, Attorneys at Law, LLC

7208 W. 80th, Ste. 202

Overland Park, KS 66204

913-385-9821 phone

913-385-9964 fax

Attorney for Appellant-Petitioner

Dated: May __2____, 2011

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief consists no more than 14,000 words, to wit: 3634, being in compliance with Rule 32(a)(7)(B). The word processing system used to produce it is Word 2008 for Mac. It is being submitted in hard copy and via CM-ECF. The Brief and Addendum have been scanned for viruses by an antivirus program, and are, as far as can be ascertained, virus free.

s/W. Michael Sharma-Crawford

W. MICHAEL SHARMA-CRAWFORD

CERTIFICATE OF SERVICE

I, W. Michael Sharma-Crawford, certify that I have on this ____3____ day of May, 2011 served a copy of the APPELLANT’S OPENING BRIEF WITH ADDENDUM on the parties hereto by electronically filing the brief via CM-ECF

s/W. Michael Sharma-Crawford

W. MICHAEL SHARMA-CRAWFORD

Attorney at Law