IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROY L. DENTON *
Plaintiff - Appellee *

* Case No. 08-6406

v. *

STEVE RIEVLEY *
Defendant - Appellant *

Plaintiff - Appellee's
Motion to Dismiss for Lack of Jurisdiction

Pursuant to F.R.A.P. 27 the Plaintiff - Appellee Roy L. Denton, *pro se*, respectfully moves this Honorable Court to dismiss this interlocutory appeal as presented and filed by the Defendant - Appellant Steve Rievley on the grounds of lack of jurisdiction. In support of his motion, Mr. Denton submits the following:

Before this court can address Appellant Steve Rievley's interlocutory appeal, the court must first determine whether it has jurisdiction over Mr. Rievley's claims. As a general rule, the federal appellate courts have no jurisdiction under 28 U.S.C. § 1291 to review interlocutory decisions such as the denial of a summary judgment. Nevertheless, the collateral-order doctrine excepts a narrow range of interlocutory decisions from the general rule. See *Cohen v. Beneficial Indus. Loan*

Corp., 337 U.S. 541 (1949). However, because 28 U.S.C. § 1291 gives appellate courts jurisdiction to hear appeals only from "final decisions," interlocutory appeals are the exception, not the norm. In *Mitchell v. Forsyth, 472 U.S. 511 (1985),* the Supreme Court clarified the scope of this exception, holding that orders denying summary judgment are immediately appealable under the collateral order doctrine where (1) the defendant was a public official asserting a defense of qualified immunity, and (2) the issue appealed concerned not which facts the parties might be able to prove, but rather whether or not those facts showed a violation of clearly established law. *Id. at 528*.

The basis for the *Mitchell* decision was the Court's conclusion that pretrial orders denying qualified immunity were "effectively unreviewable," since review after trial would come too late to vindicate the right of public officials not to stand trial in certain circumstances. *Id. at 525-27*. At the same time, the Court made it clear that the right of public officials not to stand trial is far from absolute, and that orders denying summary judgment on the basis of qualified immunity would be immediately appealable only when [an] appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the

challenged actions. *Id. at 528*. The Supreme Court unanimously reaffirmed this limit to the immediate appealability of orders denying summary judgment on the basis of qualified immunity in *Johnson v. Jones, 515 U.S. 304 (1995),* holding that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id. at 319-20.*

Under the collateral order doctrine for an interlocutory decision to be appealable as a final order it must satisfy two criteria: (1) "[I]t must conclusively determine the disputed question," and (2) that question must involve a claim "of right separable from, and collateral to, rights asserted in the action." *Mitchell v. Forsyth, 472 U.S. 511, 527 (1985) (internal citations omitted); see also Wallin v. Norman, 317 F.3d 558 (6th Cir. 2003).*

There is no doubt that a decision on qualified immunity involves a claim of right that is separate from, and collateral to, rights asserted in a section 1983 action so long as the appeal ***does not challenge the facts*** of the case but rather only raises a question of law. *Mitchell, 472 U.S. at 527*. [emphasis added]

Furthermore, in this circuit, it is well established that, for appellate jurisdiction to lie over an interlocutory appeal, a defendant seeking qualified immunity must be willing to concede to the facts as alleged by the plaintiff and discuss only the legal issues raised by the case. *Shehee v. Luttrell, 199 F.3d 295,*

299 (6th Cir.1999) (citing Berryman v. Rieger, 150 F.3d 561, 563 (6th Cir.1998) (explaining that "in order for ... an interlocutory appeal based on qualified immunity to lie, ***the defendant must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case***"*))*, *cert. denied, 530 U.S. 1264, 120 S.Ct. 2724, 147 L.Ed.2d 988 (2000).* [emphasis added]

Mr. Rievley at the very onset of his filing of this instant interlocutory appeal completely ignores the facts in light of Mr. Denton as well as the district courts finding of Mr. Denton "being arrested ***inside his house without warrant***, consent or exigent circumstances by Mr. Rievley. This is clearly evidenced in Mr. Rievley's statement to this court in his *Civil Appeal Statement of Parties and Issues* whereas Mr. Rievley claims in his very First issue that Mr. Denton was arrested on "***his front porch***". This statement in and of itself is completely devoid of established rule and law regarding an interlocutory appeal. Furthermore, the statement is misleading and is drawn from absolutely no finding of the district court nor any facts as stated by Mr. Denton but disputed facts from Mr. Rievley's version. *[See attached Civil Appeal Statement of Parties and Issues - Ex. A].*

A district court's mere assertion that disputed factual issues exist does not automatically preclude an immediate appeal. *See Behrens v. Pelletier, 516 U.S. 299, 312-13 (1996).* To the contrary, rulings remain appealable where the

defendant appeals the denial of qualified immunity on the basis of stipulated facts, on the facts as alleged by the plaintiffs or on the facts the district court deems sufficiently supported to create jury issues. *See Salim v. Proulx, 93 F.3d 86, 89 (2d Cir. 1996) (Newman, J.)*. However, as Judge Newman went on to emphasize, "[w]hat we may not do, after *Johnson* and *Behrens*, is entertain an interlocutory appeal in which a defendant contends that the district court committed an error of law in ruling that the plaintiff's evidence was sufficient to create a jury issue on the facts relevant to the defendant's immunity defense." *Id. at 91*. Guided by these principles, this circuit has generally not hesitated to dismiss interlocutory appeals where the defendant interposes factual issues in the appeal.

"It is clear 'that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.'" *Estate of Carter v. Detroit, 408 F.3d 305, 307 (6th Cir. 2005)* (quoting *Johnson v. Jones, 515 U.S. 304, 319-20 (1995)*). "[D]enial of qualified immunity is an appealable final decision under 28 U.S.C. § 1291, but only 'to the extent that it turns on an issue of law.'" *Id. at 309* (*quoting Mitchell v. Forsyth, 472 U.S. 511, 530 (1985)*). Therefore, "[i]n this interlocutory appeal this court may review only 'purely' legal arguments." *Estate of Bing v. Whitehall, 456 F.3d 555, 563 (6th Cir. 2006) (citing Smith v. Cupp, 430 F.3d 766, 772 (6th Cir. 2005))*.

While Mr. Rievley is required to "raise only the legal issue of whether the facts set forth by [Mr. Denton] constitute a violation of clearly established law," all arguments advanced by Mr. Rievley on the issue of qualified immunity in fact rely on his own disputed version of the facts and not the facts as alleged by Mr. Denton. Here Mr. Rievley has not so conceded the facts. This instant interlocutory appeal should not have been filed in the minimum and in part because there is clearly a factual dispute at the very heart of the qualified immunity issue.

Mr. Rievley's interlocutory appeal easily fails the standard for appealability in the aftermath of *Johnson* and *Behrens*. The district court held that ***"Plaintiff should not have been arrested in his home without a warrant".*** See [R. 51 Memorandum Opinion pgs. 11-12]. The district court in rejecting Mr. Rievley's qualified immunity claim the district court held that ***"it is clearly established law that the defendant could not enter plaintiff's house to arrest him in the absense of a warrant, consent or exigent circumstances."*** See [R. 51 Memorandum Opinion pgs. 13-14.]

Mr. Rievley has manifestly not based his appeal on these facts. A reading of Mr. Rievley's Brief clearly presents itself that even on his interlocutory appeal, the parties' views of the facts could not be more different. Certainly, virtually all the issues raised within Mr. Rievley's Brief clearly rely upon Mr. Rievley's assertion of his side of the facts while glossing over Mr. Denton's facts. One important and

chief dispute as held by the district court was that the plaintiff testifies that he was arrested ***inside his house*** while Mr. Rievley asserts that the arrest was ***on the front porch***. See R. 51 Memorandum Opinion pg. 11.

In other words, there remains to be decided an elementary question of fact: Did or did not defendant/appellant arrest the plaintiff/appellee inside his house without a warrant, consent or exigent circumstances or not? The Honorable Chief Judge Collier of the district court has held **YES** to this dispute finding that the evidence favorable to Mr. Denton evidenced that Mr. Rievley arrested Mr. Denton INSIDE his house without warrant, consent or exigent circumstances. Under the rule of *Johnson v. Jones* - and as elaborated on in *Booher v. Northern Kentucky University Board of Regents* by this circuit - the existence of this factual issue renders interlocutory appellate review of defendant's qualified immunity request inappropriate.

Mr. Rievley, as a matter of law, must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's [Mr. Denton] case, and clearly he has failed to do so. Mr. Rievley has also failed to adhere to the standard of "unqualified concession" as to the facts. In essence, Mr. Rievley has effectively pleaded himself out of court and his interlocutory appeal on it's face is alleged to had been filed to protract litigation.

In conclusion, for the reasons stated and set forth herein, the Appellee, Mr.

Roy L. Denton respectfully moves this Honorable Court to DISMISS the interlocutory appeal of the Appellant Mr. Steve Rievley for lack of jurisdiction. Additionally, Mr. Denton moves that this court use it's discretion and impose upon the Appellant Mr. Steve Rievley double costs (excluding attorney fees) under 28 U.S.C. 1912 for his bringing this appeal and unnecessarily protracting the litigation.

Respectfully submitted this 13th day of March, 2009

Roy L. Denton, *pro se*
120 6th Ave.
Dayton, TN 37321
423-285-5581

CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of this document has been served upon all parties of interest in this cause by placing an exact copy of same in the U.S. Mail addressed to such parties, with sufficient postage thereon to carry same to it's destination, on this 13th day of March, 2009.

Roy L. Denton

Copy mailed to:

Ronald D. Wells, BPR# 011185
Suite 700 Republic Centre
633 Chestnut Street
Chattanooga, TN 37450 --- Phone:423-756-5051

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CIVIL APPEAL STATEMENT OF PARTIES AND ISSUES

Case No: 08-6406 Case Manager: Cheryl Borkowski

Case Name: Roy Denton v. Steve Rievely

Is this case a cross appeal? ☐ Yes ☑ No
Has this case or a related one been before this court previously? ☐ Yes ☑ No
If yes, state:
Case Name: _____ Citation: _____
Was that case mediated through the court's program? ☐ Yes ☑ No

Please Identify the Parties Against Whom this Appeal is Being Taken and the Specific Issues You Propose to Raise:

This appeal is being taken against the Plaintiff, Roy Denton. Officer Rievely raises two issues on appeal. First, Officer Rievley raises the issue of whether his warrantless arrest of the Plaintiff on his front porch violated the Plaintiff's Fourth Amendment rights. Second, Officer Rievely appeals the District Court's denial of his defense of qualified immunity. Specifically, was the District Court correct in denying his defense of qualified immunity of a police officer accused of violating the Plaintiff's constitutional rights when the police officer was acting in accordance with a Tennessee statute that explicitly states "the preferred response of the officer is arrest" in cases where the officer has probable cause to believe that domestic abuse has occurred whether in his presence or not and when the police officer was acting in accordance with his understanding of Tennessee Attorney General Opinions which state that a police officer may make a warrantless arrest if the officer has probable cause to believe that a crime involving domestic abuse has occurred?

This is to certify that a copy of this statement was served on opposing counsel of record this 18th **day of** December, 2008.

Ronald D. Wells
Name of Counsel for Appellant

EX A

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