IN THE COURT OF APPEALS
STATE OF GEORGIA

CASE NUMBER A14A2021

CRAIG BROWN, HANK SCOTT, and DAVID HANEY
Appellants (Defendants below)

v.

MICHAEL JUSTIN BELT
Appellee (Plaintiff below)

REPLY BRIEF OF APPELLANTS

FROM THE SUPERIOR COURT FOR THE COUNTY OF GLYNN,
STATE OF GEORGIA, CIVIL ACTION NO. CE13-00528-063
THE HONORABLE STEPHEN G. SCARLETT, SR. PRESIDING

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Introduction

Appellee argues that appellant police officers lacked arguable reasonable suspicion to detain Belt, lacked arguable probable cause to arrest Belt, and that a jury issue remains as to the existence of malice. Appellee conflates and confuses the criminal standard for conviction of obstruction, and the civil standard for federal qualified immunity.

Appellants are entitled to qualified immunity for two separate reasons: (1) The law was not clearly established, and (2) Belt did not suffer a constitutional violation. Since appellants are entitled to qualified immunity with respect to appellee's federal claim of malicious prosecution, the merit of the criminal defenses to Belt's obstruction charge is immaterial.

Additionally, regardless of qualified immunity, appellants are also entitled to summary judgment because Belt's malicious prosecution claim fails as a matter of law.

Argument and Citation of Authority

1. Appellants are entitled to federal[1] qualified immunity because the law was not clearly established at the time when Belt was arrested.

Making no argument to the contrary, appellee seemingly concedes that the law was not clearly established at the time Belt was arrested. Accordingly, appellants are entitled to qualified immunity and to summary judgment as a matter of law. As set forth previously, "[g]overnment officials performing discretionary functions are granted a qualified immunity shielding them from imposition of personal liability pursuant to 42 USC § 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Thomas v. Holt, 221 Ga. App. 345, 347-348(1) (1996).

The Superior Court's own Order denying qualified immunity sets forth, "[t]here was no clearly established law in December of 2008 which held that persons who actually enter private property with firearms when that had been prohibited by the owner could not be required to identify themselves." (R-207). It is undisputed that

[1] Plaintiff's only remaining claim is one for malicious prosecution, under federal law.

Belt was on private property with a firearm when questioned. (Supp.R-3). By the Court's own Order, the law was not clearly established at the time of the incident, and so the officers should have been granted summary judgment because they are entitled to qualified immunity. Appellee failed to articulate any law, demonstrate any evidence, or assert any argument to the contrary. The inquiry should end here, and appellants should be granted qualified immunity and summary judgment.

2. There was arguable reasonable suspicion to detain Belt.

Alternatively, because Belt did not suffer a constitutional violation, appellants are entitled to qualified immunity, and to summary judgment. A plaintiff seeking to overcome the defendants' privilege of qualified immunity must show: "(1) that the officer violated her federal constitutional or statutory rights, and (2) that those rights were clearly established at the time the officer acted." Douglas Asphalt Co. v. Qore, Inc., 541 F.3d 1269, 1273 (11th Cir. 2008). It was lawful for the officers to stop Belt if, under the totality of the circumstances, they had an objectively reasonable suspicion that he had engaged, or was about to engage, in a crime. "The 'reasonable suspicion' must be more than an 'inchoate and unparticularized suspicion or hunch.'"

United States v. Powell, 222 F.3d 913, 917 (11th Cir. 2000) (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

Appellee repeatedly asserts that appellant police officers had no basis to conclude that Belt was a shoplifting suspect, and so they had no reasonable suspicion to detain him. This belies the facts in the record and quoted in appellee's own brief. When the appellant officers arrived at the scene, the first thing they were told was that Belt was a shoplifting suspect.

Upon arrival, Officer Scott was informed by mall security guard Lt. O'Neal[2] that Belt was an armed shoplifting suspect who was being evasive, and refused to verify his identity.

> Q. Okay. And then when you arrived at the scene what happened?
>
> A. I observed Mr. Belt speaking with Lieutenant O'Neal. There were a few other security officers on the scene. I am not sure what their names are. I spoke briefly with Lieutenant O'Neal. He said that they had received

[2] The trial court dismissed Lt. O'Neal. Plaintiffs stated that they had no objection to his dismissal. (T-19; R-210). Lt. O'Neal is not a party to this appeal.

some complaints about Mr. Belt having a gun inside the mall and that he had also been identified as a suspect in a shoplifting at the f.y.e music store inside the mall and he had made contact with him outside in the parking lot.

Q. And had you heard anything about this shoplifting incident before you spoke to Lieutenant O'Neal?

A. As far as?

Q. Well, had there been - - had an officer been dispatched to respond to that or had there been a - -

A. Not through our dispatch center, no.

Q. Okay. So this is the first that you were aware of that shoplifting incident?

A. When I initially made contact with Lieutenant O'Neal, yes, sir.

Q. Okay. Did Lieutenant O'Neal say anything else to you then before you had interaction with Mr. Belt?

A. He just advised that Mr. Belt was being evasive, wouldn't provide any identification or anything like that and just continued to ignore his request to verify his identity.

Scott dep. 11:3 - 12-6.

Accordingly, Officer Scott was not investigating some hunch that he had, but rather was informed by mall security that Belt was a suspect. Prior to Officer Brown's arrival, Officer Scott observed Belt acting unusually, and as if he may flee the scene. When asked whether Belt's behavior was unusual, Officer Scott explained:

A: It is unusual for somebody who hasn't committed a crime. Generally, it has been my experience, if someone hasn't committed a crime they will generally talk to you. It is also an indicator, I have found from fifteen years almost of law enforcement experience, when you have somebody that has been identified as a suspect in a crime and they want to move around a lot like that, that is an indicator they may flee.

Scott dep. 15:18 - 16:1.

When Officer Brown arrived, he was immediately informed that Belt was a shoplifting suspect, and also that Belt insisted upon entering the mall with his firearm.

Q: And what happened when you got there?

A: I talked to Officer Scott first since he was the first officer on the scene, and he told me this gentleman was trying to take a gun into the mall and they told him he couldn't and he said he was going to anyway. They were basically trying to talk to him and tell him he couldn't because it was private property. Then it came out that he was a shoplifting suspect so I said, "Well, we're going to figure out who this guy is," and he wouldn't identify himself.

Brown dep. 10:13-23; See also Brown dep. 13:16-21.

Appellee argues that there is no evidence that made Belt a suspect to appellants. On the contrary, the evidence is clear that when appellants arrived on the scene they were immediately informed by mall security that Belt was a suspect. Further, Belt's unusual evasive and furtive behavior only raised appellants' suspicions. "Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot, the officer may briefly stop the suspicious person and make 'reasonable inquiries' aimed at confirming or dispelling his suspicions." Proescher v. Bell, 966 F. Supp. 2d

1350, 1364 (N.D. Ga. 2013) (quoting Terry at 30). Appellant officers articulated why they investigated and initially detained Belt[3]. Because they demonstrated arguable reasonable suspicion, they are entitled to qualified immunity.

3. There was arguable probable cause to arrest Belt.

Pretermitting that the law was not clearly established at the time Belt was arrested, appellant officers are entitled to qualified immunity so long as there was arguable probable cause for his arrest. Means v. City of Atlanta Police Dep't, 262 Ga. App. 700, 705 (2003).

Instead of arguing that there was no arguable probable cause for Belt's arrest of obstruction, appellee argues that Belt was not required to verify his identity, and that this cannot be the basis for a charge of obstruction. However, "under Georgia case law dealing with the offense of obstruction, the standard for determining whether an officer was lawfully discharging his duties such that a refusal to provide identification would constitute obstruction is whether a reasonable suspicion existed

[3] The trial court concluded that defendants were entitled to judgment as a matter of law with respect to any claim that Belt was unlawfully detained. (R-210).

to stop the individual charged with obstruction." Gainor v. Douglas Cnty., Georgia, 59 F. Supp. 2d 1259, 1282 (N.D. Ga. 1998). As noted above, appellants demonstrated reasonable suspicion to stop Belt. Accordingly, his failure to provide identification constitutes probable cause for the arrest of obstruction.

Appellee primarily relies on Ewumi v. State, 315 Ga. App. 656 (2012). However, because Ewumi was not decided at the time of the incident which serves as the basis for Belt's suit, its holding has no bearing on the qualified immunity analysis.[4] Even if it did, though, Ewumi did not expressly disapprove any cases. The Georgia Court of Appeals recently distinguished Ewumi, limiting it to its particular facts, namely where officers could not articulate a suspicion of criminal activity whatsoever. See Thomas v. State, 322 Ga. App. 734 (2013); Hernandez-Espino v. State, 324 Ga. App. 849 (2013). Here, the officers had at least arguable probable

[4] Since Ewumi was not decided until 2012, it could not serve as clearly established law in 2008. Further, in Georgia, case law may only be clearly established through opinions issued "by the Supreme Court, the Eleventh Circuit, or the Supreme Court of Georgia." Barnes v. Zaccari, 669 F.3d 1295, 1307 (11th Cir. 2012).

cause to detain Belt. When they arrived they were immediately informed that Belt was a shoplifting suspect. Accordingly, Ewumi is inapposite.

Unlike the other cases cited by appellee, Belt was arrested for obstruction, not for violating a statute that required him to truthfully identify himself. In Kolender v. Lawson, 461 U.S. 352 (1983), the U.S. Supreme Court declared a California statute that required persons loitering on the street to provide a credible and reliable identification unconstitutionally vague. Appellee then misleads the Court by asserting that United States v. Brown, 731 F.2d 1491 (11th Cir.1984) interpreted O.C.G.A. §16-10-24(a), the obstruction statute under which Belt was arrested. In Brown, the 11th Circuit Court of Appeals interpreted Code 1933, § 26-2506, which actually was the precursor to O.C.G.A. §16-10-25. That statute states:

> A person who gives a false name, address, or date of birth to a law enforcement officer in the lawful discharge of his official duties with the intent of misleading the officer as to his identity or birthdate is guilty of a misdemeanor.

Ga. Code Ann. § 16-10-25.

As noted in Gainor, "Brown did not deal with Georgia's obstruction statute." Gainor, *supra*, at 1284. Belt was arrested for obstruction, in violation of O.C.G.A. §16-10-24(a), and not the type of statute at issue in the cases cited by appellee. Appellee's arguments might have merit if Belt had been arrested for violating O.C.G.A. § 16-10-25, but he was not. He was arrested for obstruction, and the appellants have articulated and demonstrated why: after he was identified as a shoplifting suspect, Belt was evasive, standoff-ish, acted unusually, acted as if he might flee, and refused to provide identification, thereby obstructing and hindering the officers in the discharge of their duties. (Supp.R-3; Brown dep. 17:12 - 18:23; Belt dep. 44:2-8). Belt was aware that officers Scott and Brown were on-duty police officers. (Supp.R-2, 3). He was arrested for obstructing and hindering them in the discharge of their duties when he refused to cooperate, after repeatedly being instructed to do so. (Supp.R-3; Brown dep. 17:12 - 18:23; Belt dep. 44:2-8).

The alleged knowledge component of the obstruction statute, O.C.G.A. §16-10-24(a), may have provided a defense to the criminal charge, but it has no application to the qualified immunity analysis. Because there was probably cause, or at the very

least, "arguable" probable cause for Belt's arrest, appellants are entitled to qualified immunity.

4. Belt's malicious prosecution claim fails as a matter of law.

Appellants moved for summary judgment as to all claims made by plaintiffs. The trial court granted summary judgment for all claims except for Belt's federal claim of malicious prosecution. Since malice is an element of that claim, it was preserved for appeal. See Post Properties, Inc. v. Doe, 230 Ga. App. 34, 40 (1997).

For a federal malicious prosecution claim arising in Georgia, the constituent elements are: "(1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused." Wood v. Kesler, 323 F.3d 872 (11th Cir. 2003). The "existence of probable cause defeats a §1983 malicious prosecution claim." Grider v. City of Aurburn, Ala., 618 F.3d 1240, 1256 (11th Cir.2010).

Belt deposed that the appellant officers did not intend to harm him (Belt dep. 56:2). There is no evidence of malice in the record. The officers were entitled to summary judgment on Belt's claim.

Appellee argues that the *prima facie* evidence of probable cause which arose through the waiver of a preliminary hearing as contemplated in Garmon v. Warehouse Groceries Food Ctr., Inc., 207 Ga. App. 89, 93 (1993) and Monroe v. Sigler, 256 Ga. 759, 760(3) (1987) has been overcome and rebutted by Belt. Indeed, this *prima facie* showing may be overcome, but here Belt has failed to do so. In his brief, appellee cites to Garmon, but fails to include the entire sentence that explains how one may overcome the *prima facie* evidence of probable cause. It reads,

> "Although the effect of such a *prima facie* showing of probable cause varies among jurisdictions, we favor the view followed by most courts that this type of *prima facie* establishment of probable cause may be overcome by the accused, as plaintiff in the subsequent action for malicious prosecution, through producing evidence that, if believed, would show want of probable cause."

Garmon v. Warehouse Groceries Food Ctr., Inc., *supra*. (emphasis provided).

Appellee makes the conclusory assertion that Belt has overcome the *prima facie* showing, but fails to demonstrate a want of probable cause. In reality, there is none. Appellee refers to his prior arguments that because Belt was not required to

verify his identity, there was no probable cause to arrest him. As noted above, if Belt had been arrested in violation of O.C.G.A. § 16-10-25 for merely refusing to verify his identity, then this argument might have merit, but in this case it is not applicable since he was arrested for obstruction in violation of O.C.G.A. § 16-10-24(a). Further, appellee's argument ignores the record evidence which demonstrate probable cause for Belt's arrest of obstruction: as a shoplifting suspect, he was evasive, standoff-ish, acted unusually, acted as if he might flee, and refused to provide identification, thereby obstructing and hindering the officers in the discharge of their duties.

Appellee argues that the issues of malice and probable cause are reserved for the jury, but the cases cited limit this reservation only to when there is evidence of fabricated evidence. There is no indication of fabricated evidence in the record. Appellee argues that the shoplifting investigation was a "fiction," but it is undisputed in the record that when appellants arrived at the scene, they were informed by mall security that Belt was a shoplifting suspect. It is undisputed that after his arrest for obstruction, an employee from the store came outside to identify whether Belt was the shoplifter. (Belt dep. 45:9-14). There is no evidence in the record to suggest a fabrication. In Curves, LLC v. Spalding Cnty., Ga., 685 F.3d 1284 (11th Cir. 2012),

the Eleventh Circuit Court of Appeals affirmed the grant of summary judgment on plaintiff's malicious prosecution claim where "[p]robable cause existed to prosecute, and the record reflects no evidence of malice." Id. at 1293. The same result should accrue.

Conclusion

For the reasons set forth herein and in appellants' principal brief, the Superior Court erred by denying appellants' defense of qualified immunity, as well as their Motion for Summary Judgment. The trial court should be reversed in that regard.

Respectfully submitted, this 22nd day of August, 2014.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing pleading by addressing same to:

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and depositing same in the United States Mail with sufficient postage affixed to assure delivery.

This the 22nd day of August, 2014.

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