IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

LUKE WOODARD	)	
	)	
Plaintiff	)	**CIVIL ACTION FILE NO.**
	)	
v.	)	**4:08-CV-178-HLM**
	)	
TYLER DURHAM BROWN et.al.,	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Summary

Defendants' Motion relies on facts unsupported by affidavits or authenticated documents. Defendants also rely heavily on a mistaken belief that Plaintiff's criminal "case" was not terminated in his favor, while overlooking that ***Plaintiff never had a criminal proceeding*** that could terminate favorably or unfavorably. Finally, Defendants display a misunderstanding of Georgia law relating to carrying weapons and disorderly conduct. Because there is a genuine issue of material fact and because Defendants have failed to meet their burden of showing they are entitled to judgment as a matter of law, their Motion must be denied.

Argument

I. The "Pretrial Diversion" Was Not Tantamount to a Plea Bargain

IA. There Was no Criminal Proceeding Against Plaintiff

Defendants mistakenly conclude that, because (according to Defendants) Plaintiff's criminal "proceeding" did not terminate favorably (for him), he cannot maintain the instant action. The fatal flaw in Defendants' argument is that ***criminal proceedings never were initiated against Plaintiff.*** There was no indictment, no criminal complaint, and no criminal information. Nothing.

Defendant Brown wrongfully arrested Plaintiff in May 2008. By September 2008, the Paulding County District Attorney still had done nothing with the case (in terms of indictment or accusation) and opted to refer it for "pretrial diversion" rather than file any charges against Plaintiff.[1] Ultimately, the District Attorney dismissed the warrants against Plaintiff without ever accusing or indicting him. Decl. of Luke Woodard, ¶ 3; Doc. 18-3, p. 50. In fact, the District Attorney made a point of notifying the Paulding County Superior Court that he was dismissing the warrants "prior to being accused or presented to the grand jury." *Id.*

[1] The phrase "pretrial diversion" in this case is somewhat misleading, as that name implies that there is a criminal proceeding at hand. While the Paulding County District Attorney's office does not have written guidelines for pretrial diversion (as is required by O.C.G.A. § 15-18-80), adjacent Cobb County specifically says in its guidelines that pretrial diversion is not available unless a case has been indicted or accused.

Thus, the District Attorney never commenced a criminal proceeding against Plaintiff. In fact, the District Attorney still is free to do so at any time within the applicable statutes of limitations. *State v. Hanson*, 249 Ga. 739, 744 (1982) (Holding that court approval is not required merely to dismiss an unindicted warrant, but that court approval is required for an enforceable agreement to forego prosecution in the future). The District Attorney specifically mentioned *Hanson* in his dismissal of the warrants against Plaintiff, thereby indicating his intention to dismiss unindicted warrants only.

Defendant never attempts to define what constitutes a "proceeding." In order to understand what constitutes a "proceeding," it is helpful to examine the purpose of the requirement that a "proceeding" terminate favorably. "The Supreme Court has observed that the requirement of favorable termination in the context of malicious prosecution suits prevents parallel litigation over the issues of probable cause and guilt and the possible creation of conflicting resolutions arising our of the same or identical transactions." *Uboh v. Reno*, 141 F.3d 1000, 1004 (11th Cir. 1998). That is, interests of equity, comity, and federalism indicate that federal courts should not take actions that have the effect of reviewing the decisions of state courts on the same matter.

This is the same doctrine underlying the *Younger* doctrine that prevents federal courts from issuing injunctions against state court criminal proceedings (established in *Younger v. Harris,* 401 U.S. 37 (1971)). In that context, injunctions are available when no state court criminal proceedings are underway. And, no "proceeding" is considered to be underway when an indictment has not been obtained, even if an arrest has been made and a warrant has been issued. *United States v. Varella,* 692 F.2d 1352, 1358 FN 4 (11th Cir. 1982); *United States v. Robinson,* 767 F.2d 765, 768 (1985) (No "proceeding" is pending between arrest and either accusation or indictment); *Westin v. McDaniel,* 760 F.Supp. 1563, 1567 (M.D. Ga. 1991). *See also Dombrowski v. Pfister,* 380 U.S. 479 (1965). This logic supports the common sense understanding that a "proceeding" is some sort of business before a court or judicial officer. *Black's Law Dictionary*, 6th Ed. It further follows that a proceeding is commenced with the filing of an indictment or accusation. In the instant case, no such documents were filed and no proceeding ever existed.

It is especially noteworthy that none of the cases cited by Defendants for the proposition that a proceeding must terminate favorably involve a case where ***no criminal proceedings had been initiated.*** (*Warren*, indictment had been filed, 594 F.2d 1048; *Aschan*, defendant waived indictment and confessed, 861 F.2d 521;

Hicks, indictment had been filed, 693 F.2d 33; *Garcia*, criminal complaint had been filed, 519 F.2d 1344; *Waters*, person was brought before magistrate to answer charges, 142 GA. 138; *Coggins*, was not even a criminal case, but a civil case that went to trial; *Laster*, case went to a preliminary hearing, 181 Ga. App. 609.

IB. The Case Against Plaintiff Terminated Favorably

While there was no criminal proceeding against Plaintiff, the "case" against him did terminate favorably (contrary to the Defendants' belief)[2]. Plaintiff did not admit to his guilt and there was no adjudication of his guilt. He therefore continues to enjoy his constitutionally-mandated presumption of innocence. Plaintiff did not pay a fine or fee of any kind, despite Defendants' documents indicating that a fee was part of the "pretrial diversion." Plaintiff did not serve any probation [Second Decl. of Luke Woodard, ¶ 2], which is a matter of factual dispute between the parties (and thus serving as an independent reason for denying Defendants' Motion). Plaintiff's seized property (his firearms) was returned to him.

[2] Defendants boldly assert that "it is undisputed that, by entering into the Pre-Trial Diversion Agreement and completing the conditions of same, the Plaintiff did not obtain a favorable termination of the criminal charges against him." Plaintiff notes that it is becoming increasingly common for a party declare a fact to be "undisputed" when the party has never ascertained whether in fact the fact is disputed. Lest there be any misunderstanding, Plaintiff vehemently disputes Defendants' cavalier and unsupported assertion on this topic.

Defendants incorrectly assert that the "pretrial diversion" arrangement was "tantamount to a plea bargain." It was not. Defendants overlook that in Georgia, a plea bargain is accompanied by relinquishment of 6th Amendment rights. *Hanson*, 249 Ga. at 740. In Plaintiff's case, he never waived his 6th Amendment rights. There was no colloquy or written document in which Plaintiff waived any rights at all. If Paulding County were to decide at this late date to indict or accuse Plaintiff, which it certainly is empowered to do, Plaintiff still would enjoy his full panoply of 6th Amendment rights in such a proceeding.

Neither did Plaintiff confess any crimes or otherwise provide the District Attorney with any information relating to crimes, thereby waiving his 5th Amendment rights (the consideration mentioned in *Hanson* as commonly given in exchange for immunity). The only things Plaintiff did in exchange for the dismissal of the warrants against him were 1) to attend a Utah concealed weapons permit class for which he paid nothing (normally a $100 value); and 2) work at a gun show for a gun rights organization to which he belongs, GeorgiaCarry.Org. Woodard Depo., p. 100.

It also is noteworthy that Plaintiff is statutorily entitled to have the record of his arrest expunged. Under O.C.G.A. § 35-3-37(d)(1)(B), a person (such as Plaintiff) is entitled to an expungement when "the prosecuting attorney dismisses

the charges without seeking an indictment or filing an accusation." Because the "case" terminated with Plaintiff's presumption of innocence intact, and because Plaintiff is entitled to have the record of his arrest expunged, it is difficult to imagine how Defendants conclude that the case did not terminate favorably for Plaintiff.

III. Defendant Brown Lacked Probable Cause to Arrest Plaintiff for Carrying a Concealed Weapon

It is apparent in this case that Defendant Brown did not understand the concealed carry statute on the day he arrested Plaintiff, and he continues to misunderstand it today. In his Brief, Brown repeatedly asserts that Plaintiff's firearm was not carried "in an open manner and fully exposed to view," apparently believing (incorrectly) that the quoted language (from O.C.G.A. § 16-11-126) requires the entirety of the weapon in question to be exposed. That is not the law in Georgia. Brown also fails to recognize that the law of concealed carry in Georgia is very different in automobiles than when the weapon is carried about the person not in conjunction with an automobile.

O.C.G.A. § 16-11-126(a) provides, in pertinent part, that "A person commits the offense of carrying a concealed weapon when such person knowingly has or carries about his or her person, unless in an open manner and fully exposed to

view, [a weapon]." There is a significant body of case law in Georgia regarding what it means to be "in an open manner and fully exposed to view," so there is no need to conjecture on that meaning.

Brown concedes in his own Brief that "at worst, [Plaintiff's firearm] was concealed all-the-way up past the trigger." Doc. 18-11, p. 18. That is, the grips, hammer, and rear portion of the slide were visible (as seen in the photograph in Brown's brief, *Id.*). Brown concludes that "it defies logic that Plaintiff would even try to argue that having as much as 2/3 of the pistol concealed could in any way be reasonably considered fully exposed." *Id.* The problem with Brown's argument is that his belief (that "fully exposed" means the entirety of the weapon is exposed) is not the law. In fact, case law indicates that just an exposed handle of a gun complies with the statute and thus is "fully exposed."

"The evidence in the case at bar shows that the witness and the arresting officer both clearly saw the ***handle*** of the pistol and immediately recognized it as a pistol. ***The pistol thus was not concealed.*** *Goss v. State,* 165 Ga. App. 448, 450 (1983). Also, "a defendant cannot be guilty of carrying a concealed weapon where 'there is no indication that the arresting officer or anyone else failed to immediately recognize upon approaching defendant that he carried a pistol.'" *Id., citing McCroy v. State,* 155 Ga. App. 777, 779 (1980). And, "Georgia law does

not prohibit carrying a pistol in a pants pocket with the butt exposed…." *Gay v. State*, 233 Ga. App. 738, 739 (1988).

The Supreme Court of Georgia rejected Defendants' interpretation of the law over 140 years ago:

> [F]or it is impossible for one to have and bear about his person a pistol or weapon of any kind without having some part of the weapon concealed from view. If one holds it in his hand, some part of it is hidden from the view, yet it is not concealed. So, if the barrel be pushed behind a belt or waistband of the pants, the whole pistol can not be seen by a third person; yet, such person, from the parts of the pistol exposed to view, can see at a glance that it is a pistol….What the Legislature did intend, was to compel persons who carried those weapons to so wear them about their persons, that others, who might come in contact with them, might see that they were armed….

Stockdale v. State, 32 Ga. 225, 227 (1861). The *Stockdale* court was interpreting a statute that used the same operative phrase as the current O.C.G.A. § 16-11-126(a), which requires that weapons be carried "in an open manner and fully exposed to view." 1851 Ga. Laws 269.

Thus the law could not be any more clearly established. When, as in the instant case, the butt of a gun protrudes from a person's pants, the gun is not "concealed" for the purposes of O.C.G.A. § 16-11-126. Brown should have known that Plaintiff was carrying his firearm in a lawful manner. Brown lacked probable cause to arrest Plaintiff.

None of the cases apply that Brown cites for the proposition that a partially concealed firearm is "concealed" for the purposes of the statute. What Brown fails to realize is that Georgia courts have elaborated on the application of the concealed weapons statute depending on whether the weapon is in a car. As discussed above, guns partially protruding from pants (outside of a car) are not concealed. On the other hand, guns partially protruding from under a seat or between the seats in a car are concealed. This development was first announced in the *Moody v. State*, 184 Ga. App. 768 (1987). In *Moody*, the court applied the *Stockdale* test to cars, noting that a person is not put on notice that a driver is armed, even if the gun protrudes from the seat:

> The amount of exposure of the weapon is not as important as the method in which the gun is carried…. As was pointed out in *Stripling*, the law forbidding the carrying of concealed weapons was designed to put those dealing with such persons on notice so that they could govern themselves accordingly. Here, a gun slightly protruding from under the seat of a vehicle does not put others on notice and, therefore, is not 'fully exposed' within the statute governing such weapons.

Id.

With the context of *Moody* explained, it becomes apparent that the case law cited by Brown merely emphasizes the same rule established by *Stockdale* (which *Moody* cites) continues to apply to this day:

In *Summerlin* the gun was in a car and at times was completely concealed by the suspect's body. The officer did not become aware of it until after Summerlin exited his vehicle. 259 Ga. App. 749. This is consistent with the *Stockdale* line of cases because not everyone was put on notice that Summerlin was armed.

In *Marshall,* the gun was only partially visible to some, but not to all. 129 Ga. App. 733. Again, not everyone was put on notice that Marshall was armed, still consistent with *Stockdale.*

In *Moody* (discussed above), the gun was not visible until someone walked up and looked in the car window. Thus, a car occupant's armed status is not plainly apparent to someone who merely encounters the car on the road. 184 Ga. App. 768.

Gainer involved a gun that was completely hidden by pocket, with only the "bulge" recognizable as a gun. 175 Ga. App. 759.

Anderson is yet another car case, where the officer testified that the gun was not initially visible ***at all.*** 203 Ga. App. 118.

IV. Defendant Brown Lacked Probable Cause to Arrest Plaintiff for Disorderly Conduct

As an initial matter, it should be noted that Defendant Brown admits that the decision to arrest Plaintiff was Brown's and Brown's alone. Brown Depo., p. 32.

Thus, only the information possessed by Brown at the time Brown made the arrest is relevant in examining whether ***Brown*** had probable cause to arrest Plaintiff. It is important to note this, because Brown attempts to confuse this Court by including in his Motion statements from witnesses and other officers. Unless the information contained in those statements was made known to Brown before he arrested Plaintiff, such information has no bearing on this case.

Brown admits that he did not confer with any witnesses himself. Brown Depo., p. 16:

Q. You didn't speak directly with any of the witnesses?

A. Not to my recollection.

Thus, Brown's sole source of information before arresting Plaintiff was whatever other officers told him and what he himself observed. Because he arrived on the scene after the allegedly disorderly conduct occurred, his own observations cannot have contributed to his probable cause determination.

Disorderly conduct is defined in O.C.G.A. § 16-11-39, which, for the purposes of this case is O.C.G.A. § 16-11-39(a)(1):

> [Whenever a person A]cts in a violent or tumultuous manner toward another person whereby such person is placed in reasonable fear of the safety of such person's life, limb, or health.

Brown admits that Plaintiff did not act in a violent or tumultuous manner:

Q. Did you get any information from any of the officers that interviewed witnesses that Mr. Woodard made any violent actions towards any witnesses?
A. No.
…
Q. Did you receive any information that Mr. Woodard made any violent actions towards anyone?
[Objection]
A. No.
Q. Did you receive any information that Mr. Woodard made any tumultuous actions towards any person?
[Objection]
A. Tumultuous from towards any single person, no.
Q. What about towards a group of people?
[Objection]
A. Directly toward a specific entity, I would say no.

Brown Depo., pp. 22-23. At most, Brown had information that some of the witnesses were afraid of Plaintiff:

Q. Now, what witness information was relayed to you by the officers that contributed to your decision to arrest Mr. Woodard?
A. That he had made them think that he was about to hurt somebody.
Q. Do you know which witnesses said that?
A. Not by name, no.
Q. But do you know them by some other means than their name?
A. I can't quote who said what.
Q. Okay. Did they specify what particular actions made them think he was going to hurt someone?
A. The fact that he was acting agitated, walking in and out of the store. He was manipulating the weapon in his pants or his waist when he was going into the store. And that in general was – they were very scared by that.
Q. And then, just to clarify, you don't know which witnesses were scared?
A. At this time I cannot tell you the names.

Q. Okay, is there someone else who knows which witnesses were scared?
A. I'm not sure.
…
Q. Did any witnesses report to you or did you get information via one of the officers who interviewed the witnesses that any of the witnesses reported that he had drawn the weapon?
A. No.

Brown Depo., pp. 20-22. The unknown, unidentified (and unidentifiable) witnesses that were afraid of Plaintiff were, apparently, afraid of a man with a gun, even though the gun was in his pants and never was drawn. It is questionable, therefore, whether their fears were reasonable.

Even assuming *arguendo* that witnesses were reasonably afraid, there still is the problem that Brown had no knowledge that Plaintiff had been violent or tumultuous. Brown now claims in his Brief that Plaintiff was tumultuous by Plaintiff's 1) pulling his Trans Am up onto the curb; 2) partially blocking the entrance to the store; 3) repeatedly entering and exiting the store; and 4) fidgeting and manipulating the pistol "crudely shoved into his pants." Doc. 18-11, p. 24. Brown makes no attempt to reconcile his Brief with his testimony, in which he swore that he had no knowledge of tumultuous actions on Plaintiff's part.

There are multiple other problems with Brown's current claim of Plaintiff's being tumultuous. Brown claims to have stood in Scott's parking lot for some 30 minutes, speaking with officers and gleaning that Plaintiff parked his car with one

tire on the curb [Doc. 18-4, ¶ 9], partially blocking the entrance. This claim is remarkable because ***there is no curb in front of Scott's store, neither near the entrance nor anywhere else***:

Second Declaration of Luke Woodard, ¶¶ 4-5. Thus, Brown now claims to have based his arrest on Plaintiff's parking one tire on a non-existent curb. If Brown really had made the arrest decision based on this fact, while standing in Scott's parking lot, surely he would have at least glanced in the direction of the store to see

what curb the witnesses were talking about. The fact that he did not leads one to the inescapable conclusion that Brown's deposition testimony was accurate and his Brief is not. Brown did not know of any tumultuous actions on Plaintiff's part, yet Brown arrested Plaintiff, anyway.

Also problematic with Brown's Brief is his claim that Plaintiff (in addition to parking on a curb that does not exist) partially blocked the entrance of the store with his car. Brown does not elaborate on what this "partial" blockage consisted of, nor does he say what about it was tumultuous. What he does claim, however, is that Plaintiff entered and exited the store during the incident ("four or five times") [Doc. 18-12, ¶ 8. He also claims that one person had "run out of Scott's Store" and another "quickly exited" the store. Doc. 18-5, ¶¶ 11, 13. Whatever significance Brown attaches to the alleged "partial" blockage, Plaintiff's car clearly did not impede customers from entering and exiting the store, even while running. Again, the inescapable conclusion is that Brown testified correctly in his deposition (that Plaintiff was not tumultuous) and that Brown now is trying to backpedal by calling anything he can think of "tumultuous."

Finally, it should be noted that the witness statements upon which Brown now depends for his alleged finding of Plaintiff's tumultuousness on May 12, 2008, were signed on May 12, 2009 [Doc. 18-5, Doc. 18-6] and June 1, 2009 [Doc.

18-4], a year after Brown made his probable cause determination. Brown did not have those witness statements on the day in question, nor did he speak to any of those witnesses.

What is clear from this case is that several citizens called 911 when Plaintiff entered Scott's store while wearing a pistol, which he was perfectly entitled to do. Despite the fact that Plaintiff was neither violent nor tumultuous (and did not draw his gun), some people were frightened of him. Brown and his cohorts over-reacted to the calls because they had nothing better to do that day, making a "felony stop" [Doc. 18-4, ¶ 15] of Plaintiff based on nothing more than "man with a gun." Brown claims that his corporal's order to hold non-emergency radio traffic until Plaintiff was stopped "underscor[es] the seriousness of the situation." In reality, it underscores the gross overreaction of Brown and his department. "Man with a gun" is no different from "man with a wallet." *See United States v. Ubiles*, 224 F.3d 213, 218 (3rd Cir. 2000).

V. Defendants Are Not Entitled to Qualified Immunity

Qualified immunity is a doctrine that applies only to claims for monetary damages. It is no bar to claims for declaratory and injunctive relief. *D'Aguanno v. Gallagher*, 50 F. 3d 877, 879 (11th Cir. 1995) ("because qualified immunity is a defense only to claims for monetary relief, the district court erred in granting

summary judgment on plaintiff's claims for injunctive and declaratory relief"). Thus, even if Defendants were entitled to qualified immunity (which they are not), such immunity would apply only to Plaintiff's claim for damages, and would not apply to his claims for declaratory and injunctive relief.[3]

Defendants misinterpret *Scarbrough v. Myles*, 245 F.3d 1299, 1302 (11th Cir. 2001) when they apply the sentence, "Arguable probable cause does not require an arresting officer to ***prove*** every element of a crime or to obtain a confession before making an arrest, ***which would negate the concept of probable case and transform arresting officers into prosecutors.***" [Emphasis supplied]. In their Brief (Doc. 18-11, p. 23), Defendants interpret the quoted sentence (conveniently omitting the emphasized phrase) to mean that only some elements of probable cause have to be present and officers are free to disregard the ones that are not present.

When considering the portion of the sentence omitted by Defendants, the context clarifies that officers are not required to ***prove*** all the elements of the crime, but officers must reasonably believe all the elements are present. By contrasting officers with prosecutors, the distinction is that prosecutors, at trial, must ***prove*** every element of a crime. On the other hand, officers, making arrests,

[3] Defendants do not make this distinction, giving the impression that they are seeking qualified immunity against all Plaintiff's claims.

must only reasonably believe that every element is present. This is emphasized by the *Scarbrough* court when it says "qualified immunity is analyzed under a standard of "objective legal reasonableness. Our inquiry is whether [the officer] … had sufficient objective evidence to make the arrests…." 245 F.3d at 1303 [internal citations omitted]. Thus, it is not a matter of whether probable cause actually existed, it is a matter of whether the arresting officer reasonably believed that it did.

Analyzed in the foregoing context, Brown did not have arguable probable cause for arresting Plaintiff on either charge.

VA. There Was No Arguable Probable Cause for Carrying a Concealed Weapon

Defendants mistakenly rely on *Summerlin*, *Marshall*, *Moody*, *Gainer*, and *Anderson* for the proposition that a partially concealed gun is "concealed" for the purposes of O.C.G.A. § 16-11-126. As discussed in Section III above, none of these cases applies to the facts of this case, i.e., where a gun is worn outside a car and the butt is exposed. Instead, case law in Georgia makes clear that a gun worn in those circumstances is "fully exposed." Defendants' refusal to acknowledge the case law that does apply (*see, e.g., Stockdale*, *Stripling*, *Goss*, *McCroy*, and *Gay*, all cited above in Section III) cannot shield them from liability.

In order to avoid qualified immunity, "The burden is on the plaintiff to show that, when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful," *Post v. City of Ft. Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993). Plaintiff has carried this burden.

As discussed in Section III above, Georgia has well-developed case law about what constitutes a concealed weapon, especially a firearm, in different circumstances. A firearm is concealed if it is visible to some, but not to all (*Marshall*), if it is sometimes concealed and sometimes not concealed (*Summerlin*), if it is partially concealed in an automobile (*Moody*), if only its "bulge" can be seen through clothing (*Gainer*), or if only a fraction of an inch is visible (*Anderson*).[4] A firearm is not concealed if it is carried in the hand (*Goss*), or if the handle protrudes from the clothing, making it clearly recognizable as a firearm (*Goss; McCroy; Stockdale v. State*, 32 Ga. 225 (1861) (pistol shoved into the waistband of one's "pantaloons" is not concealed)), even if it is only visible from certain viewing angles (*Stripling v. State*, 114 Ga. 538, 40 S.E. 733 (1901)).

[4] Of course, none of the car cases would apply to Plaintiff during the times he was in his own car, because Plaintiff possesses a Georgia firearms license ("GFL"). A GFL holder may carry a gun in a car in any manner without running afoul of O.C.G.A. § 16-11-126. O.C.G.A. § 16-11-126(b).

The facts of the instant case, as known to Brown at the time he arrested Plaintiff, are that Plaintiff wore a pistol shoved into the waistband (of his "pantaloons"), that the entirety of the handle protruded from his waistband, and that it was recognizable as a gun (evidenced by the fact claimed by Defendants that many people called 911 to report Plaintiff wearing a gun). Under these facts, which fit squarely into *Goss*, *McCroy*, *Stockdale,* and *Stripling,* it is clearly established that Plaintiff was within his rights to carry his gun in that manner.

VB. There Was No Arguable Probable Cause for Disorderly Conduct

Brown relies heavily on his mistaken interpretation that he must believe that only some, but not all, of the elements of the crime must be present in order for him to have arguable probable cause. As discussed above, that simply is not the law. If it were, there would be no end of litigation over how many elements must be present and which ones. In the case at bar, the only substantive element even arguably present is that people were frightened of Plaintiff (this is arguable because they must be "reasonably" frightened to qualify). If it were disorderly conduct for someone to fear a man, without more, it would be a crime every time a physically intimidating person enters any convenience store, where relatively close contact with others can be expected.

Brown admitted in his deposition that he had no information that Plaintiff was violent or tumultuous, as discussed above in Section III. He apparently continues to admit lack of violence. He now tries, however, to invent tumultuousness out of where Plaintiff parked his car. Brown does not even claim that the car was parked in a tumultuous manner, there being no evidence that Plaintiff raced into the parking lot or anything of the sort. If parking on a (non-existent) curb is tumultuous, there are disorderly parkers all over downtown Atlanta.

VI. Much of Defendants' Exhibits Are Inadmissible

Pursuant to Fed. R. Civ. Proc. 56(e), summary judgment must be based on "facts that would be admissible in evidence…. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit." Exhibits A, B, F, G, H, and I (Docs. 18-2, 18-3, 18-7, 18-8, 18-9, and 18-10) all are unauthenticated by affidavit or otherwise. In addition, they all contain hearsay (though some portions may fall under the hearsay exception of admissions of a party opponent).

"Inadmissible hearsay generally cannot be considered on a motion for summary judgment." *McCaskill v. Ray*, 279 Fed. Appx. 913, 914 (11th Cir. 2008). The exception is that evidence may be presented in inadmissible form for motions

but must be submitted in admissible form at trial. *Id.* It is possible that some (though certainly not all) of Defendants' exhibits would fall into this exception, but they still are not authenticated. It is error for a court to consider hearsay evidence that is not authenticated. *McCaskill*, 279 Fed. Appx. At 915; *Abel v. Southern Shuttle Services, Inc.*, 301 Fed. Appx. 856, 861(11th Cir. 2008). *See, also, First National Life Insurance Company v. California Pacific Life Insurance Company*, 876 F.2d 877, 881 (11th Cir. 1989).

VII. There is a Genuine Issue of Material Fact

Summary judgment must be denied when there is a genuine issue of material fact. In the instant case, Defendants base their claim of qualified immunity on the disorderly conduct charge on Plaintiff's alleged parking a tire on the curb in front of Scott's Store. Because Plaintiff disputes that he did so, and even disputes that there is a curb in front of Scott's Store [Second Declaration of Luke Woodard, ¶¶ 4-5], this portion of Defendants' Motion must be denied. Moreover, Plaintiff disputes that he was required to serve any probation or pay any fee or fine as part of his "pre-trial diversion." *Id.*

Conclusion

Because there is a genuine issue of material fact, and because Defendants have failed to prove that they are entitled to judgment as a matter of law, their

Motion must be denied. Moreover, Defendants' unauthenticated and inadmissible exhibits must be disregarded by the Court.

/s/ John R. Monroe
John R. Monroe
Attorney for Plaintiff
9640 Coleman Road
Roswell, GA 30075
678-362-7650
john.monroe1@earthlink.net

Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing was prepared using Times New Roman 14 point, a font and point selection approved in LR 5.1B.

/s/ John R. Monroe
John R. Monroe

CERTIFICATE OF SERVICE

I certify that on June 25, 2009, I filed the foregoing, together with accompanying documents, using the ECF system, which automatically will send a copy to:

G. Kevin Morris
kevin@tew-law.com

/s/ John R. Monroe
John R. Monroe