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

LUKE WOODARD	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL ACTION FILE NO.**
	)	**4:08-CV-178-HLM**
TYLER DURHAM BROWN, and	)	
ALTON RABON PAYNE,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

COME NOW TYLER DURHAM BROWN and ALTON RABON PAYNE, the Defendants in this action, and, pursuant to Fed.R.Civ.P. 56, file this their Brief in Support of their Motion for Summary Judgment as follows:

FACTS

On May 12, 2008, Paulding County Deputy Tyler Brown received a dispatch concerning Plaintiff Luke Woodard around 6:00p.m. Deposition of Defendant Brown (hereinafter "Brown depo.") at 5-6. Specifically, Paulding County 911 advised Deputy Brown that a citizen called and reported that a white Trans Am had driven up on the curb of Scott's Convenience Store, that the driver was a white male, no shirt, with tattoos and that he was possibly "10-32" (armed) with an

unknown type of gun. 911 Audio, attached as Exhibit "A" at 00:15-00:34. Concerned as to the type of gun, Deputy Brown called the complainant while he was *en route* in order to get more info. Id. at 01:12-01:33

I responded to the Scott's Store on Hwy 101 North. Due to the nature of the dispatch (subject with firearm entering store) I called the complainant to gather additional information. I spoke with Ms. Miller who stated that a white male driving a white Pontiac Trans Am (Tag HA7JLP) pulled up close to the store on the curb. She stated the male entered the store. She observed a black handgun partially exposed in the subjects waistband. She said the subject was going in and out of the store.

Paulding Def. Exhibit "B" (Brown Rpt) at 038. And, when he learned the type of gun, he broadcast as much over the radio and specifically to Deputy Ray Payne, who was responding as back-up. Exhibit "A" (911 Audio) at 02:10-02:15. "Hey 135, the subject's got a black handgun stuck in the back of his pants, going in and out of the store." Id.

During this time, at least three (3) other people at the store and nearby started calling Paulding 911 and reporting erratic behavior.

Narrative By: RBM 05/12/2008 18:04
jentsy johns adv the man is now going into the store w/ the gun. caller is actually at a place down from the store.

Narrative By: MAS 05/12/2008 18:08
ADDL COMPL CELL CALLER-W/M, NO SHIRT SEVERAL TATTOOS...76 MODEL WHI TRANS AM. HAS A PISTOL IN HIS POCKET...SCOTT RAKESTRAW...678-873-3111

Narrative By: MAS 05/12/2008 18:15
ADDL COMPL, JASON JOHNS...770-851-0691, ADV WILL MEET WITH DEPUTY..,SUBJ WAS TRYING TO LEAVE BUT UNITS HAVE HIM STOPPED

Paulding Def. Exhibit "B" (CAD Sheet) at 046-047.

In fact, as the situation unfolded, the City of Hiram Chief of Police[1], who was off-duty driving home, overheard the radio traffic and decided to respond to the scene. Exhibit "A" (911 Audio) at 06:19-06:37. Paulding Def. Exhibit "B" (CAD Sheet) at 047. There, he observed the Trans Am and it appeared to be partially blocking the entrance to the store, with one tire on the curb. Exhibit "C" (Shirley Dec.) at ¶ 9. Plaintiff Woodard testified that he went in and out of Scott's Store four (4) or five (5) times buying lottery tickets. Deposition of Luke Woodard ("Woodard depo.") at 38 (responding affirmatively when asked if it was possible that he went in five times). Witnesses reported seeing Plaintiff outside of his vehicle manipulating what appeared to be a weapon, although some never saw the whole weapon. Declaration of Jackie Green, attached as Exhibit "D" at ¶ 16; Declaration of Vera Tenney, attached as Exhibit "E" at ¶ 9; Paulding Def. Exhibit "B" (Witness Stmts) at 040-044.

Then, just before Deputy Brown was about to arrive on-scene, Plaintiff started to leave. Exhibit "A" at 06:51. At that point, the Corporal who was monitoring the radio traffic requested that Paulding 911 hold all non-emergency radio traffic until Plaintiff's vehicle was stopped, underscoring the seriousness of the situation. Id. at 06:56; Paulding Def. Exhibit "B" (CAD Sheet) at 047.

[1] Chief Johnny Shirley is denominated as "701" on the Paulding CAD Sheet. Declaration of Chief Johnny Shirley, attached as Exhibit "C".

As Deputy Brown pulled into Scott's Store, Plaintiff was leaving. Brown Dash Cam Video, attached as Exhibit "G" at 18:11:03. Upon seeing the patrol car turn into the gas station, Plaintiff almost immediately stopped his Trans Am. Id. at 18:11:10. Then, with Chief Shirley providing cover, Deputy Brown directed Plaintiff to put his hands out of the window and asked him whether he had a weapon. Id. at 18:11:18; Brown depo. at 9.

A Officer Brown approached my window; asked me if I had any weapons.
Q Uh-huh.
A I said I did. He asked where it was. I told him it was on the small of my back. He told me to lean forward. He reached in the window, grabbed my weapon off my back, and asked for identification, after he secured my weapon.

Woodard depo. at 75.

Exhibit "G" (Brown Dashcam) at 18:11:57.

Deputy Brown then secured the EAA Witness[2], .45 caliber pistol that he retrieved from Plaintiff's waistband. Brown depo. at 9; Woodard depo. at 29, 36. And, as Deputy Brown cleared the weapon, making sure that the cartridge and live rounds were removed stored, Deputy Payne arrived on-scene. Brown depo. at 11.

Deputy Payne notified Paulding 911 that he was on-scene, and the dispatcher responded: "10-4, 135. Also advising that we have several complainants in the area." Payne Dashcam Video, attached as Exhibit "H" at 18:13:17. As Deputy Payne approached Plaintiff, he asked whether there were any more weapons in the vehicle, to which Plaintiff responded: "Yep. Gray case laying on the seat. A 9 mm Browning." Id. at 18:13:41. Plaintiff even gave Deputy Payne permission to retrieve the weapon, which Deputy Payne promptly secured. Id. at 18:13:44. Meanwhile, Plaintiff told the officers that he was licensed to carry a concealed weapon, which he then produced. Woodard depo. at 76.

During the ensuing half hour, Deputies Brown and Payne, along with other officers who arrived on-scene, met with the witnesses and interviewed them. Brown depo. at 31-32; Payne depo. at 5-6, 10-12 (testifying that dispatch had advised them that there were numerous complainants who wanted to meet with the

[2] Plaintiff is a purported gun enthusiast, as evidenced by his postings on GeorgiaPacking.Org and pictures from his myspace.com website. GeorgiaPacking.org Web Postings, attached as Exhibit "I" (Plaintiff's Username is "45SONLY"); Myspace.com Photographs of Plaintiff, attached as Exhibit "F" (In the picture titled "Lethal" by the Plaintiff, he is holding the subject EAA Witness, .45 caliber).

officers and that he "talked to just about everybody out there"). One of the witnesses described Plaintiff's behavior as being very erratic and that he repeatedly grabbed the butt of the gun and repositioned it in his pants.

> Mr. Johns said a black male entered the store while the suspect was inside and immediately ran out yelling "that man had a gun." He ran out of the parking lot and down Hwy. 101. Mr. Johns said that every time the suspect would begin walking he would grab the gun[] and move it. Mr. [Johns] said he felt the male was going to rob the store or start shooting.

Paulding Def. Exhibit "B" (Payne Rpt.) at 039.

Other witnesses told Deputy Brown that they too thought the store was about to be robbed; Mr. Johns went on to add:

> Witnesses stated that they believed the store was being robbed. One witness, Mr. Johns, stated his daughter was in the store, that she was in danger, and that just prior to our arrival he was preparing to confront the subject with his own firearm. He said the Mr. Woodard was grabing the gun when entering the store.

Paulding Def. Exhibit "B" (Brown Rpt.) at 038; Exhibit "D" (Jackie Green Dec.) at ¶¶ 8, 11, 12, and 18; Exhibit "E" (Vera Tenney Dec.) at ¶ 12.

After the deputies finished interviewing the witnesses and obtaining written statements, the deputies shared information and collaborated on whether to arrest Plaintiff. Brown depo. at 31.

> A. The officers gave me the information that they had received from witnesses. I mean, we did -- or I did contemplate, I should say, discuss what had happened and what we were being told. We looked at the language of the code section in our legal books that we have. We did talk. We talked it over, the officers on scene, yes.

Id. And, based upon the totality of the circumstances, Plaintiff was arrested for violating the concealed weapon statute and for disorderly conduct. Id. at 38. In particular, Plaintiff was arrested because he was carrying the EAA Witness, .45 caliber pistol shoved into the waistband of his pants, where it wasn't fully exposed to view. Id. at 33. Plaintiff was charged with disorderly conduct because of the number of people he frightened with his behavior.

Once arrested, Plaintiff was transported to the Paulding County jail, where he was booked-in. Brown depo. at 38. As for the weapons, the EAA Witness, .45 caliber pistol was retained as evidence and the 9 mm Browning was retained per departmental policy that prohibits firearms being left in unattended vehicles. "We have a policy at the Sheriff's Office that we're not allowed to leave any weapons, purses, anything like that in a vehicle. So we had to take the weapon and store it for safekeeping at the time." Payne depo. at 19. Once both weapons were secured in an evidence locker, the deputies had no further contact with them. Brown depo. at 43.

On September 5, 2008, Plaintiff Woodard entered into a Pre-Trial Diversion Agreement. Paulding Def. Exhibit "B" (Pre-Trial Diversion Agrmt.) at 018; Plaintiff depo. at 100. The conditions of the agreement were that Plaintiff would serve six (6) months of probation, ten (10) hours of community service and complete a gun safety course. Id. Plaintiff was able to schedule and attend the Gun Safety Course the very next day, which was conveniently offered by Plaintiff's criminal defense attorney. Paulding Def. Exhibit "B" (King's Firearm Academy Ltr) at 022; Plaintiff depo. at 97. Plaintiff completed ten (10) hours of volunteer work at the Forest Park Farmer's Market and Gun Show. Plaintiff depo. at 101.

Upon successful completion of the conditions of the PreTrial Diversion Agreement, the charges against Mr. Woodard were dropped. Paulding Def. Exhibit "B" (Dismissal of Warrant) at 016.

Pursuant to the legal authority of the District Attorney (see State V. Hanson, 249 Ga. 739, 743-742(2)(1982), the charges pending against the above-named defendant are hereby dismissed prior to being accused or presented to the grand jury, for the following reasons:

REASON: Defendant has successfully completed all terms and special conditions of their Pre-Trial Intervention Agreement.

This 27 day of October 2008.

Leslie Donaho

LESLIE DONAHO
Assistant District Attorney
Paulding Judicial Circuit

Id.

STATEMENT OF PLAINTIFF'S CLAIMS

Plaintiff's Complaint is brought pursuant to 42 U.S.C. § 1983 and alleges violations of the Second, Fourth and Fourteenth Amendments to the U.S. Constitution. Complaint at ¶¶ 35-41. Plaintiff alleges in Count I that the deputies lacked probable cause to arrest him. Complaint at ¶¶ 35-37. He further alleges that said illegal arrest "made it impossible for Plaintiff Woodard to obtain a renewal GFL, thereby depriving him of his Second and Fourteenth Amendment rights to self defense." Id. at ¶ 38. Then, Plaintiff's final averment in Count I is that his Fourteenth Amendment rights were violated because the deputies falsely and recklessly testified in procuring his arrest warrant, thereby constituting a malicious prosecution. Id. at ¶¶ 39-40.

As for Count II, Plaintiff alleges that his right to be from "unreasonable searches and seizures" was violated by Deputy Payne, when he retained the 9 mm Browning. Id. at ¶ 41.

I. PLAINTIFF'S AGREEMENT TO PARTICIPATE IN THE PRE-TRIAL INTERVENTION PROGRAM WAS TANTAMOUNT TO A PLEA AND BARS ALL OF HIS FOURTH AMENDMENT CLAIMS

When, as in this case, a plaintiff asserts a Fourth Amendment claim predicated officers using false information in an affidavit to procure warrants, courts label such a Fourth Amendment, malicious prosecution claim. Uboh v.

Reno, 141 F.3d 1000, 1002-1003 (1998).

> In Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996), for instance, we observed that [l]abeling ... a section 1983 claim as one for a "malicious prosecution" can be a shorthand way of describing a kind of legitimate section 1983 claim; the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead.

Id.

In Uboh, the plaintiff alleged that the defendant officers falsified affidavits that ultimately led to him being prosecuted for certain drug-related crimes. Id. at 1001. The Eleventh Circuit, in discussing the rubric for analyzing such claims, noted that "[b]ecause the species of Fourth Amendment violation alleged in this case arises by way of analogy to the common law tort of malicious prosecution, courts historically have looked to the common law for guidance as to the constituent elements of the claim." Id. at 1004. And "[i]n order to state a *prima facie* case for a section 1983 claim of malicious prosecution, the plaintiff must establish the elements of the common law tort as it has developed over time." Id. (quoting Hilfirty v. Shipman, 91 F.3d 573, 579 (3rd Cir.1996)).

The Eleventh Circuit then established the *prima facie* elements of a Fourth Amendment, malicious prosecution claim: a "*criminal prosecution which is*

carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action." Id. (emphasis added). "Further, in order to state a cause of action for malicious prosecution, a plaintiff must allege and prove that the criminal proceeding that gives rise to the action has terminated in favor of the accused." Id. at 1004 (citing Kelly v. Serna, 87 F.3d 1235, 1240-41 (1996); Heck v. Humphrey, 512 U.S. 477, 484, 114 S.Ct. 2364, 2371, 129 L.Ed.2d 383 (1994) ("One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused.").

In the case *sub judice*, the criminal prosecution against Plaintiff did not terminate in his favor. Paulding Def. Exhibit "B" (Pre-Trial Diversion Agrmt.) at 018; Plaintiff depo. at 99 (confirming that his attorney negotiated the terms of said agreement). It is well-settled in the Eleventh Circuit that "[a] pretrial diversion agreement is analogous to a plea bargain agreement." U.S. v. Harris, (citing United States v. Warren, 594 F.2d 1046, 1049 (5th Cir.1979); Aschan v. Auger, 861 F.2d 520, 522 (8th Cir. 1988); United States v. Hicks, 693 F.2d 32, 33 (5th Cir. 1982); United States v. Garcia, 519 F.2d 1343, 1345 n. 2 (9th Cir.1975)). And, Georgia courts have unequivocally held that when a criminal prosecution is terminated by way of agreement or compromise, the prosecution does not terminate in the

criminal defendant's favor[3]. Waters v. Winn, 142 Ga. 138, 141, 82 S.E. 537 (1914); see also Coggins v. Gen. Motors Acceptance Corp., 47 Ga.App. 314, 170 S.E. 308 (1933); Laster v. Star Rental, Inc., 181 Ga.App. 609, 353 S.E.2d 37 (1987).

The "termination in favor of" requirement is significant because it not only serves to bar the malicious prosecution claim, it also precludes Plaintiff's other Fourth Amendment claims. "The Supreme Court has observed that the requirement of favorable termination in the context of a malicious prosecution suit prevents parallel litigation over the issues of **probable cause** and guilt and the possible creation of conflicting resolutions arising out of the same or identical transactions." Uboh, 141 F.3d at 1004 (citing Heck, 512 U.S. at 484).

For example, in the case Houston v. Tucker, the defendant officer, while

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[3] In analyzing "favorable terminations," the Eleventh Circuit noted:

> Courts have further reasoned that "only terminations that indicate that the accused is innocent ought to be considered favorable." Hilfirty, 91 F.3d at 580 (relying on Restatement (Second) of Torts § 660 cmt. a ("Proceedings are 'terminated in favor of the accused' ... only when their final disposition is such as to indicate the innocence of the accused.")); Taylor v. Gregg, 36 F.3d 453, 456 (5th Cir.1994) (per curiam) (same); Singleton v. City of New York, 632 F.2d 185, 193 (2nd Cir.1980) (same). Thus, courts have found that withdrawal of criminal charges pursuant to a compromise or agreement does not constitute favorable termination and, thus, cannot support a claim for malicious prosecution. See, e.g., Taylor, 36 F.3d at 455-56 (holding that pretrial diversion agreement, in which accused must acknowledge responsibility for offense conduct, "does not terminate the criminal action in favor of the criminal defendant for purposes of bringing a malicious prosecution claim."); Laster v. Star Rental, Inc., 181 Ga.App. 609, 353 S.E.2d 37, 38 (Ga.App.1987) ("[W]here the termination of the prosecution has been brought about by compromise and agreement of the parties, an action for malicious prosecution can not be maintained."). Similarly, courts have refused to permit a finding of favorable termination where the stated basis for the dismissal of criminal charges has been "in the interests of justice," see Singer, 63 F.3d at 118; Hygh v. Jacobs, 961 F.2d 359, 368 (2nd Cir.1992))….

investigating the welfare of minor children, got into an altercation with the plaintiff; she was charged with misdemeanor obstruction, but pled *nolo contendere* to disorderly conduct. Houston v. Tucker, 137 F.Supp.2d 1326, 1337-1338 (2000).

In the subsequent lawsuit against the officer, the plaintiff alleged that the defendant violated her Fourth Amendment rights by falsely arresting her. In granting the officer summary judgment, the court held:

> [T]he court need not address whether the defendant falsely arrested Ms. Porter, because in order to proceed on her false arrest claim Ms. Porter must show that she had a favorable outcome on her criminal charge. A plea of nolo contendere is not a favorable outcome. Accordingly, the defendant is entitled to summary judgment as to Ms. Porter's claim of false arrest.

Id. (citing Uboh, 141 F.3d at 1004-1005).

Accordingly, because 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, all of his Fourth Amendment claims are barred, thereby entitling the Defendants to summary judgment.

II. PLAINTIFF'S ARREST WAS SUPPORTED BY PROBABLE CAUSE

As an initial matter, it is important to establish the constitutional rubric for analyzing Plaintiff's claims. Deputies Brown and Payne contend that this case is

functionally analogous to Section 1983 actions premised upon alleged violations of the First and Fourth Amendments. In those cases, where the plaintiff's arrest is related to his/her speech, well-settled Eleventh Circuit precedent[4] dictates that the case be analyzed as a Fourth Amendment claim.

For example, in the Gold v. City of Miami, the plaintiff observed an able-bodied person park in a handicap parking space right in front of a Miami police officer. The plaintiff, upset that the officer did not issue a ticket, walked near the officer and loudly remarked, "Miami police don't do shit." Gold v. City of Miami, 121 F.3d 1442, 1445 (11th Cir.1997). The plaintiff, who happened to be a lawyer, made the statement a second time in the presence of another officer and was subsequently arrested. Id. Thereafter, the plaintiff sued the arresting officers for violating his First, Fourth and Fourteenth Amendment rights.

Notably, in assessing the Plaintiff's various constitutional claims, the Court limited its inquiry to whether the officers violated the plaintiff's Fourth Amendment rights. "In making this determination, the central issue is whether, on the date of Gold's arrest, the officers had arguable probable cause to believe that

[4] Sheth v. Webster, 145 F.3d 1231, 1238 (11th Cir. 1998) (Fourth Amendment analysis where plaintiff arrested after she verbally challenged officer's knowledge of law); Gold v. City of Miami, 121 F.3d 1442, 1445 (11th Cir.1997) (analyzing First and Fourth Amendment claims under pure Fourth Amendment analysis, where plaintiff was arrested after he twice loudly stated "Miami police don't do s - - -."); Williamson v. Mills, 65 F.3d 155 (11th Cir.1995)(Fourth Amendment analysis where plaintiff arrested after taking photographs of undercover officers); Post v. Ft. Lauderdale, 7 F.3d 1552, 1559 (11th Cir.1993) (granting qualified immunity to officer who arrested plaintiff Lirio, based on continued speech after officer's command to "be quiet").

Gold had committed the offense of disorderly conduct." Id. at 1445 (citing Von Stein v. Brescher, 904 F.2d 572, 579 (11th Cir.1990)). And, upon concluding that the officers had arguable probable cause, the Court made no further inquiry. Put simply, the Court concluded that the existence of probable cause, or even arguable probable cause, pretermits the First Amendment inquiry.

Similarly, the Supreme Court has eschewed analyzing claims under the more generalized notion of Fourteenth Amendment due process when the facts directly implicate the Fourth Amendment. "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, [the Fourth] Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

Here, even though Plaintiff has presented his case as setting forth distinct causes of action under the Second, Fourth and Fourteenth Amendments, this is simply a Fourth Amendment, false arrest and malicious prosecution lawsuit, just like Gold v. City of Miami and Graham v. Connor. And, as with Gold and Graham, once the Defendant deputies demonstrate that they had at least arguable probable cause, all of Plaintiff's federal claims will be ripe for dismissal.

A. PROBABLE CAUSE EXISTED TO ARREST PLAINTIFF FOR VIOLATING O.C.G.A. § 16-11-126

O.C.G.A.§ 16-11-126(a) provides as follows:

> 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**, any bludgeon, knuckles whether made from metal, thermoplastic, wood, or other similar material, firearm, knife designed for the purpose of offense and defense, or any other dangerous or deadly weapon or instrument of like character outside of his or her home or place of business, except as permitted under this Code section.

Id. (emphasis added).

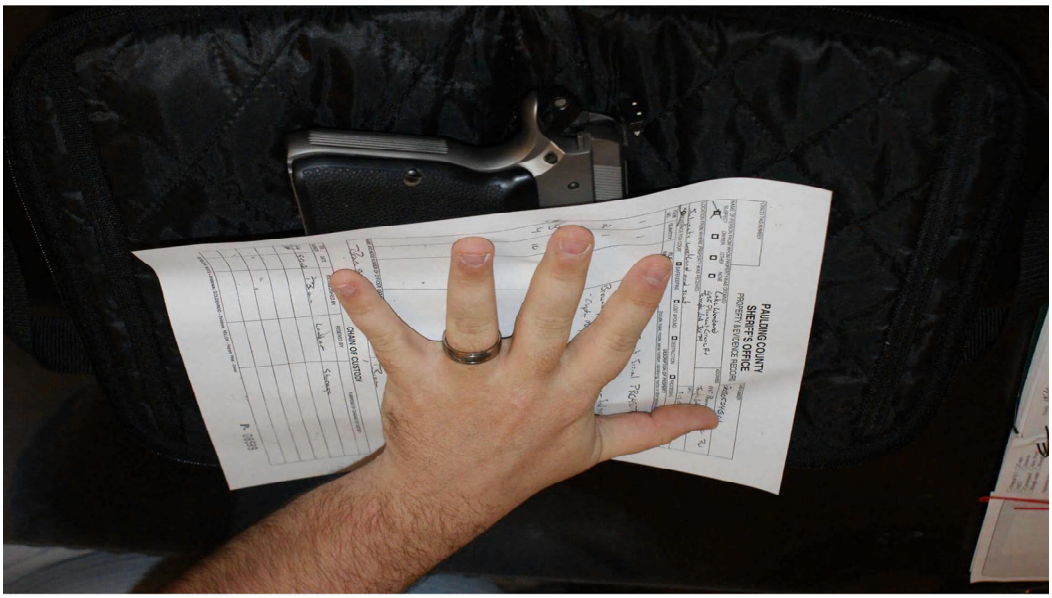
The same code section authorizes any person with a valid firearms license to carry a concealed firearm, but the weapon must be sheathed: "*the pistol, revolver, or firearm may only be carried in a shoulder holster, waist belt holster, any other holster, hipgrip, or any other similar device, in which event the weapon may be concealed by the person's clothing, or a handbag, purse, attache case, briefcase, or other closed container.*" O.C.G.A.§ 16-11-126(c)(emphasis added).

In this case, there is no dispute that Plaintiff had a firearms license. Therefore, in order for him to comply with O.C.G.A. § 16-11-126, he had to either 1) carry the pistol in an open manner, fully exposed or 2) it had to be sheathed: to carry the pistol into Scott's Store any other way would violate O.C.G.A. § 16-11-

126.

The undisputed facts demonstrate that Deputies Brown and Payne had probable cause to arrest Plaintiff because he did not have the pistol holstered nor was it fully exposed. Plaintiff does not contend that he had the pistol holstered; rather, he acknowledged that it was shoved into the waistband of his pants—in between his underwear and jeans. Plaintiff depo. at 67. Thus, because the weapon was not holstered/sheathed, it had to be carried in an open manner, fully exposed. Notably though, the undisputed evidence demonstrates that the pistol was not fully exposed, and because it wasn't fully exposed, Deputies Brown and Payne had probable cause to arrest him.

During Plaintiff's deposition, he was asked if the butt of the gun was sticking out his pants; he responded: "The grip, as well as a portion of the slide, as well the hammer." Plaintiff depo. at 37. When asked what portion of the gun was concealed in his pants, Plaintiff replied: "From the tip of the barrel to the trigger guard." Id. However, when asked whether the gun ever slid down in his pants, he admitted that the trigger guard would sometimes slide below his waistline. Id. at 69. In fact, Plaintiff conceded that the pistol may have even slid as far down as to the trigger. Id. Notably, this is about where the gun was located when Deputy Brown removed it from the back of Plaintiff's pants.



Brown depo. at 13-14.

Therefore, based upon Plaintiff's own admission, it is undisputed that the pistol was not fully visible. In fact, at best, the pistol was concealed only from the tip of the barrel to the trigger guard, and at worst, it was concealed all-the-way up past the trigger. Plaintiff depo. at 37, 69. Accordingly, based on this undisputed evidence, it defies logic that the 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. Nevertheless, because the undisputed facts show that Plaintiff did not comply with the plain language of O.C.G.A. § 16-11-126, Deputies Brown and Payne had probable cause to arrest Plaintiff.

B. PROBABLE CAUSE EXISTED TO ARREST PLAINTIFF FOR DISORDERLY CONDUCT

In addition to having probable cause to arrest Plaintiff for violating O.C.G.A.§ 16-11-126, Deputies Brown and Payne had probable cause to arrest Plaintiff for disorderly conduct. Per O.C.G.A. § 16-11-39, disorderly conduct occurs when a person:

> (1) Acts 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;
>
> (2) Acts in a violent or tumultuous manner toward another person whereby the property of such person is placed in danger of being damaged or destroyed;

In this case, there is no doubt that Plaintiff's tumultuous actions, not only placed numerous people in reasonable fear for their safety but also reasonably led them to believe that their property would be damaged or destroyed. First of all, the shear volume of calls to Paulding County 911 demonstrates that people in this rural location were upset by the Plaintiff's erratic conduct. The 911 CAD Report shows that at least four (4) different people called 911, complaining about Plaintiff's actions. Paulding Def. Exhibit "B" (911 CAD Sheet) at 046-047 (Belinda Miller, Jentsy Johns, Scott Rakestraw and Jason Johns).

Second, the witness statements and observations by Chief Shirley demonstrate that Plaintiff's actions made people scared. That is, the fact that

Plaintiff parked his car on the curb and repeatedly entered and exited Scott's Store, all-the-while manipulating what appeared to be a pistol, made the witnesses reasonably believe that he was going to either start shooting or rob the place. Paulding Def. Exhibit "B" (Witness Statements) at 040-044; Exhibit "D" (Green Dec.) at ¶¶ 8, 11, 16, 17; Exhibit "E" (Tenney Dec.) at ¶ 11; Exhibit "C" (Shirley Dec.) at ¶ 16.

Third, Plaintiff's tumultuous behavior was so threatening that he caused at least one witness to initiate fairly extreme counter-measures. Witness Johns told officers that he was so concerned for his daughter's safety that he was about to confront Plaintiff with his own firearm. Paulding Def. Exhibit "B" (Brown Rpt.) at 038; Exhibit "C" (Shirley Dec.) at ¶ 17.

> Witnesses stated that they believed the store was being robbed. One witness, Mr. Johns, stated his daughter was in the store, that she was in danger, and that just prior to our arrival he was preparing to confront the subject with his own firearm. He said the Mr. Woodard was grabing the gun when entering the store.

Accordingly, in light of the reports from witnesses and the evidence acquired, it is obvious that probable cause existed to arrest Plaintiff for disorderly conduct[5].

[5] It is well settled that "when a crime under which the arrest is made and a crime for which probable cause exists are in some fashion related, then there is no question but that there is a valid arrest." United States v. Atkinson, 450 F.2d 835, 838 (5th Cir.1971). The related crimes defense asks "whether the conduct that served as the basis for the charge for which there was no probable cause could, in the eyes of a similarly situated reasonable officer, also have served as the basis for a charge for which there was probable cause." Trejo v. Perez, 693 F.2d 482,

III. DEFENDANTS BROWN AND PAYNE ARE ENTITLED TO QUALIFIED IMMUNITY

In evaluating claims of qualified immunity, the Eleventh Circuit applies the two-part test set forth by the Supreme Court in Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L.Ed.2d 272 (2001): "(1) As a threshold question, a court must ask, taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?; and (2) If a constitutional right would have been violated under the plaintiff's version of the facts, the court must then determine whether the right was clearly established." Durruthy v. Pastor, 351 F.3d 1080, 1093 (2003)(citing Saucier, 533 U.S. at 201, 121 S.Ct. at 2156)(internal quotations omitted).

In Fourth Amendment cases involving qualified immunity[6], the focus rests on whether the law enforcement officer had arguable probable cause for the arrest—**not** the higher standard of actual probable cause. Jones v. Cannon, 174 F.3d 1271 (11th Cir. 1999); (emphasis added); Lindsey v. Storey, 936 F.2d 554, 562 (11th Cir. 1991). "An arrest without probable cause is unconstitutional, but

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486 (5th Cir.1982). In this case, the Plaintiff could have just as easily been charged with the crime of simple assault. O.C.G.A. § 16-5-20 states that "[a] person commits the offense of simple assault when he or she . . . Commits an act which places another in reasonable apprehension of immediately receiving a violent injury."

[6] To establish qualified immunity a defendant must first show that he was "acting within the scope of his discretionary authority" when he engaged in the allegedly wrongful acts. Hudgins v. City of Ashburn, 890 F.2d 396, 404 (11th Cir. 1989) (citing Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir. 1988)). This element of qualified immunity is easily met here because Deputies Brown and Payne had been dispatched in response to 911 calls from the public. Simply put, but for these Defendants' positions as law enforcement officers, they would not have been present at the scene.

officers who make such an arrest are entitled to qualified immunity if there was arguable probable cause for the arrest." Jones, 174 F.3d at 1271. This is important because "[a]rguable probable cause does not require an arresting officer to prove every element of a crime or to obtain a confession before making an arrest. . . ." Scarbrough v. Myles, 245 F.3d 1299, 1302 (11th Cir. 2001).

A. ARGUABLE PROBABLE CAUSE FOR VIOLATING O.C.G.A. § O.C.G.A.§ 16-11-126

In determining whether arguable probable cause existed to arrest Plaintiff for violating O.C.G.A. § 16-11-126, it is valuable to review Georgia suppression cases interpreting said statute. That is, the Georgia appellate courts have issued several rulings in factually analogous cases that demonstrate that Deputies Brown and Payne, at the very least, had arguable probable cause. Summerlin v. State, 295 Ga.App. 748, 673 S.E.2d 118 (2009)(concluding that revolver was not "fully exposed," even though the butt/grip was visible and recognizable by the officer); Marshall v. State, 129 Ga.App. 733, 200 S.E.2d 902 (1973)(holding that partially visible handle of a pistol that was shoved in defendant's pocket was not carried in open manner nor fully exposed); Moody v. State, 184 Ga.App. 768, 362 S.E.2d 499 (concluding that gun which slightly protruded from under seat of vehicle, and which was visible to officer through window, was not "fully exposed" but qualified

as "concealed weapon"); Gainer v. State, 175 Ga.App. 759, 334 S.E.2d 385 (1985)(fact that police officers recognized bulge in defendant's pocket as a pistol did not mean the pistol was not concealed); Anderson v. State, 203 Ga.App. 118, 416 S.E.2d 309 (1992)(concluding that judge's failure to charge on "fully exposed" was not erroneous even though defendant testified that approximately an inch of gun's handle was exposed).

In light of the fact that the above-listed cases are not so different than the facts of this case, it is obvious that, at a bare minimum, arguable probable cause existed to arrest Plaintiff for violating O.C.G.A. § 16-11-126.

B. ARGUABLE PROBABLE CAUSE EXISTED TO ARREST PLAINTIFF FOR VIOLATING O.C.G.A. § 16-11-39

As set forth above, "[a]rguable probable cause does not require an arresting officer to prove every element of a crime or to obtain a confession before making an arrest. . . ." Scarbrough v. Myles, 245 F.3d 1299, 1302 (11th Cir. 2001). With respect to the disorderly conduct charge, the undisputed facts demonstrate that a majority of the elements of said crime were present. The elements of the crime disorderly conduct are: 1) an act; 2) that is violent or tumultuous; 3) is directed toward another person; 4) places such person in reasonable fear for safety or that his/her property will be damaged.

Here, the undisputed facts demonstrate that three of the four elements were

present. 1) Plaintiff definitely acted; he drove to Scott's Store and repeatedly entered with a firearm. 2) His actions were tumultuous: he pulled his Trans Am up onto the curb, partially blocked the entrance door to the store, and then, repeatedly entered and exited the store, all-the-while fidgeting and manipulating the pistol crudely shoved into his pants. 3) And finally, he caused the people in the store to reasonably fear for their safety and the well-being of their property. In fact, the only element of the crime that is arguably missing is the requirement that the act be directed towards another person.

Accordingly, because arguable probable does not require that an arresting officer prove every element of a crime and because the undisputed evidence demonstrates that 3 of the 4 elements were present, it is clear that Deputies Brown and Payne had at least arguable probable cause to arrest Plaintiff for disorderly conduct. And, because they had arguable probable cause, they are entitled to qualified immunity.

IV. PLAINTIFF'S FOURTH AMENDMENT CLAIM ARISING FROM DEPUTY PAYNE IMPOUNDING THE SECOND FIREARM IS MERITLESS

Plaintiff alleges that Deputy Payne violated his Fourth Amendment rights by impounding the 9 mm Browning. Deputy Payne unequivocally testified that said weapon was secured pursuant to departmental policy. Payne depo. at 19.

It is well-settled that officers do not offend the Fourth Amendment when they impound property pursuant to an arrest. U.S. v. Gravitt, 484 F.2d 375 (5th Cir. 1973). "It cannot be denied that to prevent escape, self-injury, or harm to others, the police have a legitimate interest in separating the accused from the property found in his possession. An inventory is then necessary both to preserve the property of the accused while he is in jail and to forestall the possibility that the accused may later claim that some item has not been returned to him." Id. (cits. omitted).

Accordingly because the evidence demonstrates that Plaintiff's 9mm Browning was secured in connection with his arrest and because there is no evidence showing that Deputy Payne had any further control over the firearm once it was stored, Deputy Payne is entitled to qualified immunity and summary judgment on said claim.

This 3rd day of June, 2009.

WILLIAMS, MORRIS & BLUM, LLC

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

LUKE WOODARD	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL ACTION FILE NO.**
	)	**4:08-CV-178-HLM**
TYLER DURHAM BROWN, and	)	
ALTON RABON PAYNE,	)	
	)	
Defendants.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing ***DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT*** upon all parties by electronic filing through the CM/ECF system in accordance with the United States District Court rules to:

John R. Monroe
Attorney at Law
9640 Coleman Road
Roswell, Georgia 30076

This 3rd day of June, 2009.

WILLIAMS, MORRIS & BLUM, LLC

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