IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARY K. REDDEL,

Plaintiff,

v.

RODNEY HICKS, BRIT GEMPELER and
WILLIAM EICHELKRAUT, in their capacity
as Deputy Sheriffs for the Green County Sheriff's
Department, and PATRICK CONLIN, in his capacity
as Sheriff of Green County.

Defendants.

OPINION AND ORDER

00-C-739-C

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This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983 in which plaintiff Mary K. Reddel contends that defendants Rodney Hicks, Brit Gempeler, William Eichelkraut and Patrick Conlin arrested her without a warrant, unlawfully searched and seized her home without a warrant, subjected her to a forced blood draw and unlawfully detained her in violation of the Fourth and Fourteenth Amendment. Subject matter jurisdiction is present under 28 U.S.C. § 1331.

Presently before this court is defendants' motion for summary judgment. Because I find that probable cause existed at the time of arrest and defendants are shielded by qualified

immunity, defendants' motion for summary judgement will be granted.

From the findings of fact proposed by the parties and from the record, I find that the following material facts are undisputed.

UNDISPUTED FACTS

Plaintiff Mary K. Reddel is a citizen of Wisconsin residing in Green County, Wisconsin. Defendants Rodney Hicks, Brit Gempeler and William Eichelkraut are deputy sheriffs of the Green County Sheriff's Department. Defendant Patrick Conlin is sheriff of the Green County Sheriff's Department.

On the evening of May 18, 1997, plaintiff was depressed, crying and had been drinking alcohol. Although plaintiff intended to dial 411 to contact directory assistance, she dialed 911 inadvertently. Plaintiff also called a 411 operator that evening and threatened to kill herself. (Plaintiff asserts that she said this jokingly.) As a result of the erroneous 911 call and suicide threat to directory assistance, Green County law enforcement personnel, including defendants Hicks, Gempeler and Eichelkraut, were dispatched to plaintiff's home to check on her welfare. When defendants arrived, they asked plaintiff to exit her residence and she declined to do so. After verbal exchanges between plaintiff, who remained inside the house, and defendants located outside the house, plaintiff became fearful and placed an unloaded, small-gauge shotgun on the kitchen counter. From outside the house, defendants

observed plaintiff carrying the shotgun and placing it on the counter in plain view. After the third demand to step outside the house, plaintiff exited with her hands up. Defendant Eichelkraut smelled a very strong odor of intoxicants on plaintiff's breath. Plaintiff was arrested and charged with being armed with a firearm while under the influence of an intoxicant pursuant to Wis. Stat. § 941.20(1)(b). The deputies seized the unloaded shotgun from the residence. Defendants transported plaintiff to the Monroe Clinic emergency room to have blood drawn in order to determine her intoxication level. Defendants were aware that the shotgun was unloaded before the plaintiff's blood was drawn. Plaintiff allowed her blood to be drawn under threat of force. Plaintiff was taken to Mendota Mental Health Facility for emergency detention because of plaintiff's continuing objection to her arrest and blood draw.

OPINION

To prevail on a motion for summary judgment, the moving party must show that even when all inferences are drawn in the light most favorable to the non-moving party, there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); McGann v. Northeast Illinois Regional Commuter Railroad Corp., 8 F.3d 1174, 1178 (7th Cir. 1993). Summary judgment may be awarded against the non-moving party only if the

court concludes that a reasonable jury could not find for that party on the basis of the facts before it. Hayden v. La-Z-Boy Chair Co., 9 F.3d 617, 618 (7th Cir. 1993). If the non-moving party fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex, 477 U.S. at 322.

Plaintiff was arrested for recklessly "go[ing] armed with a firearm while under the influence of an intoxicant" pursuant to Wis. Stat. § 941.20(1)(b). Plaintiff contends that according to Wisconsin jury instructions, to be guilty of this offense two elements are required: intoxication and a loaded firearm. Wis. JI-Criminal 1321. Plaintiff argues that at the point that defendants discovered that the shotgun was unloaded, they should have known plaintiff could not have committed the crime charged because one element of that crime (a loaded firearm) was not present. Therefore, plaintiff argues, defendants' subsequent acts of forcing a blood draw at the Monroe Clinic and detaining her at the Mendota Mental Health Facility constituted an unlawful search and seizure in violation of the Fourth Amendment. The Supreme Court has recognized that a compulsory blood test, undertaken to uncover evidence of intoxication, is a "search" and "seizure" within the meaning of the Fourth Amendment. Skinner v. Railway Labor Exec. Ass'n., 489 U.S. 602, 616-17 (1989). In response, defendants argue that they had probable cause to arrest plaintiff notwithstanding the fact that the charge was later dismissed. Defendants also contend that

they have qualified immunity.

To determine whether defendants violated plaintiff's rights under the Fourth Amendment, I must first determine whether defendants had probable cause to arrest her. If probable cause existed at the time of the arrest, then plaintiff is precluded from asserting a § 1983 claim for unlawful arrest and the issue of qualified immunity is rendered moot. See Potts v. City of Lafayette, 121 F.3d 1106, 1113 (7th Cir. 1997) ("The existence of probable cause for arrest is an absolute bar to a § 1983 claim for unlawful arrest."); Boyce v. Fernandes, 77 F.3d 946, 948 (7th Cir.1996) (concluding that the answer to the question of probable cause resolves plaintiff's § 1983 claim that her arrest was unlawful, both on the merits and for purposes of the officer's claim to qualified immunity). "While the existence of probable cause is often a jury question, summary judgment is appropriate when there is no room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them." Qian v. Kautz, 168 F.3d 949, 953-54 (7th Cir. 1999); see also Lanigan v. Village of East Hazel Crest, 110 F.3d 467, 473 (7th Cir. 1997).

In order to have probable cause for an arrest, law enforcement agents must reasonably believe, in light of the facts and circumstances within their knowledge at the time of the arrest, that the suspect had committed or was committing an offense. See United States v. Kincaid, 212 F.3d 1025, 1028 (7th Cir. 2000); United States v. Osborn, 120 F.3d 59, 62 (7th Cir. 1997). The probable cause standard is a flexible, practical common-sense one

which is met if the facts are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. See United States v. Colonia, 870 F.2d 1319, 1323 (7th Cir. 1989) (citations omitted); United States v. Evans, 27 F.3d 1219, 1228 (7th Cir. 1994). When defendants arrived at plaintiff's house, they were performing a welfare check as a result of plaintiff's calls to 411 and 911, which had given defendants the impression that plaintiff might be trying to commit suicide or harm herself. After arriving at plaintiff's residence and requesting that she step outside, defendants saw plaintiff place a shotgun on the kitchen counter. The shotgun was in plain view of the deputies who were located lawfully outside the house. See Horton v. California, 496 U.S. 128, 136 (1990); United States v. Thornton, 197 F.3d 241, 248 (7th Cir. 1999) (citing United States v. Carmany, 901 F.2d 76, 77 (7th Cir. 1990)) ("The plain view doctrine allows the warrantless seizure of evidence if a police officer was lawfully in the place from which he saw the evidence if the discovery of the evidence was inadvertent and if the incriminating nature of the property was immediately apparent to the officer."). When plaintiff finally exited her residence, defendant Eichelkraut smelled alcohol on her breath. The combination of observing plaintiff with the shotgun in plain view and smelling alcohol on her breath established probable cause to make the arrest under § 941.20(1)(b). The Court of Appeals for the Seventh Circuit held that probable cause is "an ex ante test: the fact that the officer later discovers additional evidence unknown to her at the time of the arrest is irrelevant to

whether probable cause existed at the crucial time." Qian v. Kautz, 168 F.3d 949, 953-54 (7th Cir. 1999); see also Michigan v. DeFillippo, 443 U.S. 31, 36 (1979) (arrest's validity "does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest."). Because defendants had probable cause to arrest plaintiff, they made a lawful arrest; their lawful arrest authorized a search incident to that arrest. See United States v. Robinson, 414 U.S. 218, 235 (1973). Because defendants had probable cause and made a lawful arrest, they did not violate plaintiff's rights under the Fourth Amendment when they searched her residence without a warrant, forced her to undergo a blood test and detained her at Mendota Mental Health Facility.

Even if defendants did not have probable cause, they are protected under the doctrine of qualified immunity. Under this doctrine, public officials may not be held personally liable for performing discretionary functions as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity shields the defendants, if a "reasonable officer could have believed [plaintiff's arrest] to be lawful, in light of clearly established law and the information the arresting officers possessed." McDonnell v. Cournia, 990 F.2d 963, 968 (7th Cir. 1993) (citing Hunter v. Bryant, 502 U.S. 224, 226 (1991)). Even law enforcement officials who "reasonably but mistakenly

conclude that probable cause is present" are entitled to immunity. Anderson v. Creighton, 483 U.S. 635, 641(1987).

Plaintiff argues that defendants should have known that Wis. Stat. § 941.20(1)(b) requires the firearm be loaded. But the code provision is silent on its face as to whether a loaded or unloaded weapon is required. The statute reads as follows:

> 941.20 Endangering safety by use of dangerous weapon
> (1) Whoever does any of the following is guilty of a Class A misdemeanor: . . .
> (b) Operates or goes armed with a firearm while he or she is under the influence of an intoxicant;

Note that the title of the statute is "endangering safety by use of dangerous weapon." (Emphasis added.) The statute defines "dangerous weapon" as "any firearm, loaded or unloaded." Wis. Stat. § 939.22(10). Although § 941.20(1)(b) uses the term "firearm," it is not defined in the code. Thus, the plain language of the statute does not indicate that only a loaded gun violates this statute. In fact, the use of "dangerous weapon" in the title may tilt in favor of concluding that either a loaded or unloaded weapon violates the law. Plaintiff did not cite any case law in her brief in opposition to defendants' motion for summary judgment that interprets § 941.20(1)(b) as requiring a loaded weapon. Moreover, a search of Wisconsin case law has not revealed any such precedent. Plaintiff argues that the Wisconsin jury instruction for this code provision states that "one is not armed with a firearm unless it is loaded." Wis. JI-Criminal 1321. Jury instructions are persuasive

authority, but not binding or precedential. See 75A AM. JUR. 2D Trial § 1094 (1991) (indicating it is not incumbent on trial court to give any requested jury instruction that is "an erroneous statement of the law" or "does not state the law with substantial correctness"). Moreover, a footnote to this instruction states that by requiring only a loaded gun "it [is] likely that the instruction would have accurately reflected the intent of the legislature." (Emphasis added.) Therefore, it is not even clear that this instruction does reflect legislative intent in fact. When the statute is silent and no case law interprets § 941.20(1)(b) as requiring a loaded firearm, a jury instruction that supposedly interprets the legislative intent behind the statute cannot be considered "clearly established statutory or constitutional rights of which a reasonable person would have known" for qualified immunity purposes. Harlow, 457 U.S. at 818.

Because I find that defendants had probable cause to arrest plaintiff and defendants are shielded by qualified immunity, defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that

1. The motion of defendants Rodney Hicks, Brit Gempeler, William Eichelkraut and Patrick Conlin for summary judgment against plaintiff Mary K. Reddel is GRANTED.

2. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 10th day of October, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge