IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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RONALD L. CLARK,

Plaintiff,

v.

DUSTIN BARTON and NICOLE MILLER,

Defendants.

OPINION AND ORDER

11-cv-757-slc

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In this civil rights action brought under 42 U.S.C. § 1983, plaintiff Ronald Clark alleges that defendants Dustin Barton and Nicole Miller falsely arrested him in violation of the Fourth Amendment. Before the court is defendants' motion for summary judgment. Dkt. 16.

I am granting defendants' motion. Although it appears that Barton and Miller may have had probable cause to arrest Clark for either obstructing an officer or disorderly conduct, which would render their interaction with Clark reasonable, regardless of this they are entitled to qualified immunity: A reasonable police officer in the same circumstances and with the same knowledge reasonably could have believed, even if mistakenly, that probable cause existed. This suffices to immunize them from civil liability to Clark.

Before turning to the merits of the motion, I must address a procedural issue: Clark did not respond to defendants' proposed findings of fact and he did not submit his own proposed findings of fact as required by this court's summary judgment procedures and the Federal Rules of Civil Procedure. Instead, he attempts to dispute defendants' version of the events through arguments made in his brief in response to summary judgment and affidavits and documents that he attaches to that brief. *See* dkts. 21-23.

The very first paragraph of the January 27, 2012 preliminary pretrial conference order flagged for the parties that their conduct throughout this case was governed by that order and

its attachments. Dkt. 15 at 1. The attachments to this order spell out in excruciating detail how to file a summary judgment motion and how to respond to the other side's summary judgment motion. Clark was warned that "[e]ven if there is evidence in the record to support your position on summary judgment, if you do not propose a finding of fact with the proper citation, the court will not consider that evidence when deciding the motion." *Helpful Tips for Filing a Summary Judgment Motion in Cases Assigned to Magistrate Judge Crocker #2*, attached to Preliminary Pretrial Conference Order, dkt. 15. *See also Hedrich v. Board of Regents of the University of Wisconsin*, 274 F.3d 1174 , 1178 (7th Cir. 2001) (upholding this court's summary judgment procedures). Further, "[a] fact properly proposed by one side will be accepted by the court as undisputed unless the other side properly responds to the proposed fact and establishes that it is in dispute." *Id.*, #3. "If a responding party believes that more facts are necessary to tell its story, it should include them in its own proposed facts. . . ." *Procedure to be Followed on Motions for Summary Judgment*, II.D.4, attached to dkt. 15.

The court is not obliged to "scour the record" on Clark's behalf to find admissible evidence that might support his claim of a material dispute of fact. *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007) ("[T]he nonmoving party must identify with reasonable particularity the evidence upon which the party relies."); *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003) ("A district court is not required to 'wade through improper denials and legal argument in search of a genuinely disputed fact.'") (citation omitted). Consequently, I have treated defendants' properly proposed facts as undisputed.

From the facts proposed by defendants, I find that the following facts are material and undisputed:

## UNDISPUTED FACTS

Defendant Dustin Barton has been employed by the University of Wisconsin-La Crosse as a police officer since August 20, 2010, and defendant Nicole Miller served in that position from July 2007 to November 2011. Miller is now employed by the City of Onalaska as a patrol officer. As UW-La Crosse police officers, defendants enforced Wisconsin state law, specifically Chapter 18 of the Administrative Code, which governs the University of Wisconsin system. They also preserved law, order and personal safety on all UW campuses; protected the public against offenses and property damage; investigated complaints, crimes committed and suspicious circumstances; and cooperated with authorities on various investigations.

While on patrol on the evening of October 26, 2010, defendants were called upon to provide assistance during a scheduled congressional debate being held in the Port O'Call Room at the Cartwright Center on campus: At about 6:46 p.m., Sean Dwyer, a WXOW TV news director and liaison, approached the defendants to report that there was an individual (later identified as plaintiff Ronald Clark) in the Port O'Call Room who possessed a video camera. Event policy for the debate prohibited the possession of video recorders inside the room and prohibited videotaping of any kind during the debate. Dwyer told defendants that he had advised Clark and his friend (later identified as Michael Tellier) of the event's no recording policy and asked Clark to leave but Clark ignored him.

Dwyer attempted to point Clark out in the crowd, but because the identification was not clear, he decided that he would make contact with Clark once again by presenting him with his business card so that defendants could identify him. It was decided that Barton would make contact with Clark and ask him to speak outside to avoid further disturbance or disruption of

the political debate. After Barton, Miller and Dwyer arrived at the room, Barton lost sight of Dwyer handing over the business card. When Barton got close to the back of the room, several people identified Tellier as the individual causing the problem. Barton introduced himself and asked Tellier to step outside the room. Tellier stated that he "didn't do anything" and refused. Barton asked him to step outside the room again, but he looked straight ahead and ignored the directive.

Miller heard an individual raising his voice and approached to offer Barton assistance. At this time, Barton noticed Clark, who was standing to the right of Tellier. Barton saw Clark reach down, pick up a small black nylon box and proceed to take out a video camera to film Barton's contact with Tellier. Miller observed Clark turn on a video camera that he had hidden underneath his coat. Barton asked Clark to put down the camera. Clark refused. Barton then directed Clark to put down the camera and warned him that he would have to leave the premises if he did not put down the camera. Again, Clark refused.

Barton determined that he would have to escort Clark out of the building. He secured Clark's right arm and wrist and asked him to come with him. Clark immediately tensed his arms and attempted to flop to the ground. Miller then stepped in and secured Clark's left arm. Clark was escorted out of the building by use of an escort hold with no additional disturbance.

In a standard escort hold, the officer applies a pincer grip at the bend of the escortee's elbow and places his/her other hand is on the wrist of the same arm. The pincer grip is what allows the officer to direct a subject where they want the subject to go without applying any pressure. In this case, Clark's left arm was bent because he was holding a video camera in his hand. Clark also had tensed his arms because his hand was on the video camera. Therefore,

Miller placed her right hand on Clark's left biceps and placed her left hand on Clark's left hand, which held the video camera.

After they were out of the building, Miller asked Clark for identification but Clark said that he didn't have any on him. Miller asked him to verbally identify himself, which he did. She then performed a records check and issued Clark two Chapter 18 citations: Disorderly Conduct, Wis. Admin. Code § UWS 18.11(2) and Resisting an Officer, Wis. Admin. Code § UWS 18.10(7). Clark was not handcuffed, he was not placed in a patrol car, and he was not required to post bond at the La Crosse County Jail. Clark cooperated with Barton and Miller and waited for the citations to print. The officers' encounter with Clark lasted about 15 to 20 minutes. Clark was advised not to return to the Cartwright Center that night and told that if he did, he might be charged with criminal trespass. Clark never complained of injury and did not appear to be in any discomfort.

## OPINION

### I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "'A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.'" *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780

(7th Cir. 2007). A party that bears the burden of proof on a particular issue may not rest on his pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires a trial. *Hunter v. Amin*, 538 F.3d 486, 489 (7th Cir. 2009) (internal quotation omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). He must come forward with enough evidence on each of the elements of his claim to show that a reasonable jury could find in his favor. *Borello v. Allison*, 446 F.3d 742, 748 (7th Cir. 2006); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

**II. False Arrest**

Clark alleges that defendants violated his Fourth Amendment rights because they falsely arrested and detained him without probable cause when they escorted him out of the Cartwright Center, asked him for identification and issued him citations. Defendants contend that although the administrative rules that Clark was cited with violating carried only civil forfeiture penalties, they had probable cause to arrest Clark under Wisconsin law for disorderly conduct and resisting an officer.[1] *See* Wis. Stats. §§ 946.41(1), 947.01 and 939.51.

"Probable cause to arrest is an absolute defense to any claim against police officers under § 1983 for wrongful arrest, even where the defendant officers allegedly acted upon a malicious motive." *Tebbens v. Mushol*, 692 F.3d 807, 816 (7th Cir. 2012) (quoting *Wagner v. Washington*

[1] Defendants note in passing at the end of their summary judgment brief that their detention of Clark "may well be more accurately characterized as an investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968)." Defendants did not develop this argument adequately and therefore, have waived it. *Central States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived."). As a result, I am assuming for the purposes of this decision that defendants' interaction with Clark constituted an arrest requiring probable cause.

*County*, 493 F.3d 833, 836 (7th Cir. 2007)). Whether an officer has probable cause depends on what he saw and heard and the facts known to him at the time of arrest. *Id.*; *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004); *Carmichael v. Village of Palatine*, 605 F.3d 451, 457 (7th Cir. 2010). The relevant inquiry is whether at the time of the arrest, the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). The analysis is objective: the subjective motivations of the officer cannot invalidate a seizure otherwise supported by probable cause. *Carmichael*, 605 F.3d at 457.

Whether an act constitutes an offense depends on state criminal law. *Jones v. Clark*, 630 F.3d 677, 684 (7th Cir. 2011), and officers may arrest a person for *any* conduct constituting a criminal offense, even a minor one. *Tebbens*, 692 F.3d at 818 (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001)). The Court of Appeals for the Seventh Circuit has held that "it is firmly established that the Fourth Amendment permits an officer to make an arrest when he or she has probable cause to believe that an individual has committed or is committing an act which constitutes an offense under state law, *regardless* of whether state law authorizes an arrest for that particular offense." *Id.* (citing *Virginia v. Moore*, 553 U.S. 164, 176 (2008); *Thomas v. City of Peoria*, 580 F.3d 633, 638 (7th Cir. 2009)). In other words, it is not unconstitutional to arrest a person for committing an offense that is not punishable with jail time. *Atwater*, 532 U.S. at 351-54; *Thomas*, 580 F.3d at 637-38 (summarizing Supreme Court precedent holding that Fourth Amendment does not forbid arrest for "nonjailable" offenses like minor traffic and immigration violations).

Here, Clark was cited for violating administrative rules related to resisting or obstructing an officer and disorderly conduct. *See* Wis. Admin. Code §§ UWS 18.10(7) and 18.11(2). Both rules carry the penalty of a civil forfeiture. § UWS 18.13. In addition, resisting an officer and disorderly conduct are misdemeanor offenses under Wisconsin state statutes. *See* Wis. Stats. §§ 946.41; 947.01. As explained below, it appears that defendants had probable cause to arrest Clark for both of the state misdemeanor offenses. Even if they did not, it is clear that defendants had "arguable probable cause" to arrest Clark, which is all that is required to provide defendants with qualified immunity from civil liability to Clark.

**A. Resisting an Officer**

Section UWS 18.10(7) provides:

> (a) No person may knowingly resist or obstruct a university police officer while that officer is doing any act in an official capacity and with lawful authority.

Similarly, Wis. Stat. § 946.41 makes it a Class A misdemeanor "knowingly" to resist or obstruct "an officer while such officer is doing any act in an official capacity and with lawful authority." An "officer" is defined as "a peace officer or other public officer or public employee having the authority by virtue of the officer's or employee's office or employment to take another into custody." *Id.* An officer acts in his/her official capacity when s/he performs duties that s/he is employed to perform. *See* Wis JI-Criminal 915 and 1766. An act is "with lawful authority" if it is condoned by the law. Wis. JI-Criminal 1766. To "obstruct" an officer means that the person's conduct "prevents or makes more difficult the performance of the officer's duties." *Id.*

(citing Wis. JI-Criminal 1765 (1966 vers.); *State v. Grobstick*, 200 Wis. 2d 242, 249, 546 N.W.2d 187 (Ct. App. 1996)).

The undisputed facts establish that Barton and Miller were public officers acting in their official capacities when they questioned Clark and Tellier about their video cameras. Barton and Miller are employed by the University of Wisconsin system to enforce law, order and personal safety on campus, which includes investigating complaints, crimes and suspicious circumstances. Barton and Miller had been informed that two men (Clark and Tellier) had a video camera in their possession in violation of event policy and that Clark had refused to leave when event personnel had asked him to do so.[2] While Barton was questioning Tellier about the camera, he observed Clark reach down, pick up a small black nylon box and take out a video camera to record Barton's contact with Tellier. Barton asked, then directed Clark to put the camera down, or face removal; Clark knowingly and intentionally refused to comply with Barton's explicit direction. Determining that he had no better option, Barton made good on his threat to remove Clark. Barton grasped Clark's upper right arm and wrist and directed Clark to come with him. Clark escalated his resistence by tensing his arms and attempting to flop to the ground. Barton and Miller then placed Clark in a double escort hold and walked him out of the event.

Wisconsin courts have not decided definitively whether failure to cooperate with the police can be considered "obstructing" if no physical resistance is offered. Wis. JI-Criminal 1766 n. 3. The Wisconsin Supreme Court has held that mere silence or a refusal to identify oneself to police officers—especially where the state has not shown how the refusal may have affected the officers—does not establish a violation of § 946.41. *Henes v. Morrissey*, 194 Wis. 2d 339,

[2] Clark has not challenged the event's "no video" policy.

354, 553 N.W.2d 802,808 (1995). However, unlike in *Henes*, Clark did more than simply remain silent: he persisted in flouting the event rule against recording and flouting Barton's explicit direction to stop. When Barton took hold of his arm, Clark resisted removal by attempting to flop.

"Probable cause requires only that a probability or a substantial chance of criminal activity exist." *Purvis v. Oest*, 614 F.3d 713, 722–23 (7th Cir. 2010). This threshold is below 50%; therefore, the defendants do not even have to establish that their belief that Clark was obstructing an officer was "more likely true than false." *Id.* at 723. Defendants have provided facts establishing a substantial chance that Clark was obstructing them in the performance of their assigned duties that evening. A reasonable person in these same circumstances would agree that Clark probably had committed, or was in the process of committing, the offense of obstructing an officer. As a result, Barton and Miller were acting with lawful authority and had probable cause to arrest Clark.

**B. Disorderly Conduct**

Section UWS 18.11(2) of the administrative code prohibits an individual from engaging in "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance, in university buildings or on university lands." Similarly, Wis. Stat. § 947.01 provides that

> (1) Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

The Wisconsin Supreme Court has held that there are two distinct elements of disorderly conduct: (1) the conduct must be of the type enumerated in the statute or similar thereto in having a tendency to disrupt good order; and (2) the conduct must be engaged in under circumstances which tend to cause or provoke a disturbance. *City of Oak Creek v. King*, 148 Wis.2d 532, 540, 436 N.W.2d 285 (Wis. 1989) (citing *State v. Givens*, 28 Wis. 2d 109, 115, 135 N.W.2d 780 (1965)).

Although Clark twice refused Barton's directives to stop taping and put his camera down, Clark was not violent, abusive, profane, boisterous or unreasonably loud. Therefore, for Clark's conduct to violate the statute, it must fall within the catchall category of "otherwise disorderly." The mere refusal to obey a police command, absent any other conduct, does not constitute "otherwise disorderly" conduct. *King*, 148 Wis.2d 532 at 544. Because the statute could not possibly enumerate the limitless number of antisocial acts that could destroy public order, Wisconsin courts have found that "[i]t is the combination of conduct and circumstances that is crucial in applying the ordinance to a particular situation." *Id.* at 542 (quoting *State v. Maker*, 48 Wis. 2d 612, 616, 180 N.W.2d 707 (1970)).

Here, Clark did more than simply disobey Barton's directive. Clark was recording Barton's interaction with Tellier in a public event that had prohibited the possession and use of video cameras. Then Clark flopped when Barton tried to escort him out. These actions, combined with Clark's repeated defiance, reasonably could be deemed disruptive and disorderly. *See id.* (finding same where reporters initially refused officer's orders to leave airplane crash site *and* then continued to attempt to re-enter the restricted area).

Further, the events at issue took place in a crowd and in front of other members of the public during a congressional debate where "good order" was a legitimate concern. Obviously, Sean Dwyer, the news director from WXOW TV, was disturbed enough by Clark's patent and persistent defiance of the debate's "no recording" policy to seek out police assistance to make Clark comply. A reasonably prudent person in similar circumstances could conclude that Clark's open defiance of event policy, an event liaison's request, and an officer's orders threatened to disrupt public order by causing or provoking a disturbance. *See id.* at 543-44 ("In a situation which has the potential for significant crowd control problems, common sense dictates that if one person is allowed to openly defy the authority of an officer in charge, others may soon follow.")

In short, the defendants had probable cause to arrest Clark for his apparent violations of two state criminal statutes. They did not violate Clark's Fourth Amendment rights.

**III. Qualified Immunity**

Let's assume, *arguendo*, that the defendants did *not* have probable cause to arrest Clark. They still prevail on their summary judgment motion because they are entitled to qualified immunity. "Qualified immunity protects public officials from liability for damages if their actions did not violate clearly established rights of which a reasonable person would have known." *Catlin v. City of Wheaton*, 574 F.3d 361, 365 (7th Cir. 2009) (citations omitted); *see also Fleming v. Livingston County*, 674 F.3d 874, 879 (7th Cir. 2012) (quoting same). To determine whether a right is clearly established, courts must look at the right in a "particularized" sense, rather than "at a high level of generality;" however, it is not necessary that the very action in question previously have been held unlawful. *Roe v. Elyea*, 631 F.3d 843, 858 (7th Cir. 2011)

(quoting *Safford Unified Sch. Dist. v. Redding,* 557 U.S. 364, 377 (2009); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). The basic question is whether the state of the law at the time gave defendants reasonable notice that their actions violated the Constitution. *Id.*

An individual's constitutional right to be free from arrest without probable cause is a clearly established right. *Fleming*, 674 F.3d at 879-80 (citing *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998); *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975)). Also clearly established is the doctrine of qualified immunity for police officers in false arrest cases. *Fleming*, 674 F.3d at 880. "Qualified immunity protects officers who are 'reasonable, even if mistaken' in making probable cause assessments." *Tebbens*, 692 F.3d at 820 (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)). The court of appeals has referred to this standard as "arguable probable cause," which is established:

> when 'a reasonable police officer in the same circumstances and with the same knowledge and possessing the same knowledge as the officer in question could have reasonably believed that probable cause existed in light of well-established law.'
>
> *Fleming*, 674 F.3d at 880 (quoting *Humphrey*, 148 F.3d at 725).

"[T]he qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The undisputed facts before the court establish that defendants' seizure of Clark did not place them in either of these categories. They did not knowingly violate the law and they were not plainly incompetent. To the contrary, the facts establish that this arrest was supported by probable cause. But even if this conclusion is incorrect, the defendants certainly had "arguable probable cause" to arrest Clark for either disorderly conduct or resisting an officer. As a result, the defendants are entitled to qualified immunity.

ORDER

IT IS ORDERED that the motion for summary judgment, dkt. 16, filed by defendants Dustin Barton and Nicole Miller is GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 25th day of October, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge