IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00217-REB-KLM

WILLIAM MONTGOMERY,

Plaintiff,

v.

MATTHEW CHERNAK, *et al.*,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiff's Response fails to establish the existence of a well-pleaded claim in the Amended Complaint. Instead, the Response takes a byzantine approach – parsing each element of every claim or underlying offense and deconstructing each argument and citation in Defendants' Motion to distract from Plaintiff's own behavior and suggest some viable constitutional claim must exist in the heap. Plaintiff's arguments are merely a smokescreen aimed to suggest a factual dispute even though allegations in his own complaints foreclose his claims and demonstrate grounds for qualified immunity.

I. PLAINTIFF'S FIRST AMENDMENT RETALIATORY ARREST CLAIM FAILS

A. Probable Cause Existed for Plaintiff's Arrest

Plaintiff's conclusory allegations regarding Defendants' knowledge and intent, and continued effort to recast the facts surrounding the arrest in the Response are insufficient to overcome the prima facia description of probable cause in the Amended Complaint. Probable cause for *any* crime defeats each of Plaintiff's claims for relief, including conduct that was subject to charge as well as uncharged conduct, such as criminal damage to property. The Response never

acknowledges Plaintiff's escalating behavior throughout the entirety of the event, instead cherry-picking moments in time and seizing upon the omission of facts from his original complaint in the Amended Complaint which clearly demonstrated probable cause.

Faced with numerous instances of admitted conduct that could form the basis for an obstruction charge, Plaintiff's chief argument is that his act of climbing the fence shows he was not personally a physical impediment or threat of violence to officers, and his refusals to obey orders or provide his birthdate do not constitute a crime. Plaintiff engaged in a pattern of behavior throughout the course of the interaction that formed a basis for probable cause, chief among them his refusal to return over the fence to be handcuffed *after he had already been told he was being placed under arrest.* [ECF 15, ¶43-44.] Even setting aside Plaintiff's other unlawful behavior, there can be no dispute the refusal to follow a lawful order ***after*** one has been informed they are under arrest constitutes obstruction of the officer's performance of his duty. Plaintiff's continued refusal to obey the command and use of the fence as a physical obstacle to his arrest plainly constituted obstruction under C.R.S. §18-8-102. *See* ***Dempsey v. People***, 117 P.3d 800, 811 (Colo. 2005) ("[A]lthough mere verbal opposition alone may not suffice, a combination of statements and acts by the defendant, including threats of physical interference or interposition of an obstacle can form the crime of obstruction.")

Plaintiff's other acts, including his interference in the investigation regarding Mr. Swett to the point where he had to be ordered to back away also form the basis for an obstruction charge even if, as alleged in the Response, Plaintiff did not pose a physical threat.[1] The statute is not

[1] *See* ***Depmsey***, 117 P.3d at 812 ("Dempsey would have this court analyze each segment of conduct separately, emphasizing the question of whether he had the legal right to engage in each activity. That approach is neither legally nor practically correct.")

narrowly limited to threats of violence as suggested by Plaintiff, but also prohibits obstruction, impairment or hindrance of public servants by physical interference or obstacle, which is exactly the sort of behavior Plaintiff exhibited throughout his interaction with officers. *See, e.g.*, ***Martin v. City of Okla. City***, 180 F.Supp.3d 978, 989 (10th Cir. 2016) (finding arrestee's action as a whole – distracting officers and refusing several requests and an order to leave the area – could sufficiently delay or obstruct an officer in the performance of his duties to permit a reasonable belief there was probable cause for an arrest). The conduct alleged in the Amended Complaint also clearly violates Fort Collins Municipal Code Section 17-63, which is not, as the Response alleges, limited to an order to "move on and away" from an officer, but also prohibits conduct that "disrupts, obstructs, impairs or hinders the officer's enforcement of the law" or performance of his duty, which is Plaintiff's behavior described in Defendants' Motion.

Plaintiff next challenges the existence of probable cause for the trespass charge, arguing Defendants were unreasonable in their belief his entry on the property was unlawful. These unsupported assertions are impermissibly conclusory. Plaintiff merely repeats that Defendants knew (or must have known) the area was public because he asserts it had been in the past; however, no explanation is provided for *how* Defendants knew this, especially given Plaintiff himself only learned the fence was illegal two days prior.[2] This is the exact sort of bald assertion the Supreme

[2] Plaintiff's argument Defendants did not receive a complaint from an owner is specious; the incident occurred after midnight at a fence attached to a Safeway grocery store and officers were present for Plaintiff's entire time on the property -- it is no surprise they did not receive notice from a complaining owner as he was cited shortly after climbing the fence. Plaintiff's suggestion "there were no signs posted on the property to provide any type of notice" is not contained in the Amended Complaint and, therefore, must be disregarded. Additionally, it should be disregarded because it is false. There was at least one posted sign on the Safeway grocery store prohibiting loitering in the area; however, because this fact was conspicuously omitted from the complaint, Defendants were precluded from relying upon it in their Motion.

Court has foreclosed by prohibiting wholly conclusory statements. ***Ashcroft v. Iqbal***, 556 U.S. 662 (2009); ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544 (2007). Moreover, Plaintiff has merely appended the clause "on information and belief" before conclusory allegations with no support, and which directly contradict the officers' sworn affidavit of probable cause and reports.[3]

Instead, Plaintiff perfunctorily suggests Defendants should have conducted additional investigation–an argument which directly contradicts the Amended Complaint's repeated allegation Defendants already knew the land was public. However, Plaintiff's own allegations demonstrate numerous emails involving at least two city officials as well as the private company who erected the fence were all consulted to ascertain its legality, and there is no way such investigation could occur after midnight as Plaintiff stood on the street (across from residences) yelling to his brother and "protesting" with a raised voice to officers and bystanders. *See* Affidavit, Ex. 1; ECF 14, ¶3, 47, 53; ECF 1, ¶42.[4] Plaintiff argues the officers were unreasonable and imprudent for not conducting a full-scale investigation and waking city officials in the night because "there was no exigent need to arrest Plaintiff immediately," yet provides no explanation regarding the converse: there was no exigent need for Plaintiff to climb the fence and protest, when he could have simply returned over it at the first request (or not climbed it at all) and continued to work with the City Inspector and City Planner to have the illegal fence removed. Plaintiff's entire course of conduct must be recognized; he was not calmly standing or mounting a peaceful protest,

[3] The Response argues this Court cannot consider the probable cause affidavit because it was not incorporated by reference in the Amended Complaint. However, Plaintiff referred to the affidavit of probable cause for arrest multiple times in the Amended Complaint. [Motion, fn. 4; ECF 14, ¶56, 59, 90.]

[4] Plaintiff argues this Court cannot consider the prior complaint, but does not address cases cited in the Motion which demonstrate factual allegations made in a prior complaint which were merely omitted to circumvent arguments raised in a motion to dismiss may be considered in the interest of justice.

his own allegations demonstrate his escalating behavior from his intervention in the Defendants' contact with Mr. Swett throughout their interaction with him, culminating in their need to cut the fence as he yelled and "protested" every step of the way.

Finally, Plaintiff argues there was not probable cause for the disorderly conduct charge.[5] Throughout the Response and Amended Complaint, Plaintiff downplays his behavior, suggesting he "only verbally question/criticized [*sic*] the officers conduct and/or verbally defended himself from the officers' use of their authority." (Response at 15.) This is a departure from Plaintiff's original complaint, which alleged Plaintiff raised his voice to match that of the officers in his efforts to protest the fence and educate passersby. [Motion at 4, citing ECF 15-1, deleting ¶42; *See also* Affidavit of Probable Cause ("Montgomery began to yell and scream at officers"… "There were several residential homes across the street from the property Montgomery had un-lawfully entered.")] Plaintiff's effort to frame his behavior at an esoteric intersection between protected criticism and disorderly conduct is a ploy to detract from behavior which, by his own description, violated C.R.S. 18-9-106 and was intended to disrupt passersby and disturb nearby residents.

B. **PLAINTIFF'S RETALIATION ALLEGATIONS ARE CONCLUSORY**

Plaintiff's descriptions of alleged animus against him for his criticisms are mere conclusions lacking any factual basis. For instance, the only supporting citations contained in the Response identifying any alleged acts by Defendants are allegations in the Amended Complaint

[5] Plaintiff argues Defendants did not address his charge for resisting arrest in their Motion because "there is no allegation that Plaintiff committed anything resembling forceful or threatening conduct." Plaintiff is correct that no such facts exist in his Amended Complaint, rendering it inappropriate for Defendants to introduce those facts pursuant to Fed. R. Civ. P. 12(b)(6). However, Defendants do not concede such facts do not exist. Plaintiff's argument "Defendant officers" charged him "in absence of any supporting conduct, further demonstrat[ing] the[ir] unreasonableness," is patently untrue. The officers' contemporaneous reports, not referenced in the Amended Complaint, state Plaintiff was physically resistive during the arrest.

the Defendants "expressed visible and audible annoyance," "took obvious offense," "appeared visibly upset and annoyed." [Response at 19, citing ECF 14, ¶36, 38, 51.] These statements are no more than Plaintiff's own conclusions and speculation. There is no allegation of any statements by Defendants that Plaintiff's arrest was the result of anything other than his unlawful acts committed in their presence. The allegations of an agreement among officers to charge Plaintiff is based *solely* on his own admission the alleged conversation was had outside of his audible range and the limitation the allegation is made "on information and belief." [*Id*, ¶50-51.] Finally, Plaintiff's argument Defendant Chernak revoked Plaintiff's bond in a criminal matter approximately four days later falls flat; the affidavit in support of warrantless arrest, signed at the time of arrest on February 28, 2016 indicates at Class 6 felony charge for violation of bail bond. [Ex. A.] Moreover, Plaintiff provides no support for the notion Defendant Chernak was permitted to choose not to report the bond violation. Plaintiff's allegation of a continued animus by Defendant Chernak in the weeks or months following the arrest are conclusory and unsupported by the records incorporated by reference in the Amended Complaint.

C. Qualified Immunity Applies

Again, the Response focuses on the minutiae regarding dates underlying cases cited in Defendants' Motion to distract from the larger picture regarding whether the law was clearly established for officers on the street in 2016 whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest. The parties both cite the Supreme Court's decision in ***Reichle v. Howards***, 556 U.S. 658, 665-670 (2012), which overrules ***Howards v. McLaughlin***, 634 F.2d 1311, 1148 (10th Cir. 2011). In ***Reichle***, the Court expressly declined to rule on the underlying proposition, instead overturning on qualified immunity grounds.

The ***Reichle*** Court said, "[H]ere, the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free form a retaliatory arrest that is otherwise supported by probable cause. *This Court has never held that there is such a right*." ***Id***. at 665 (emphasis added). The Response's treatment of ***Reichle*** is an oversimplification, and the state of the law in its wake is anything but clearly established, as evidenced by the Supreme Court's recent decision in ***Lozman v. City of Riviera Beach Florida***, No. 17-21, 585 U.S. __ (June 18, 2018).[6] Plaintiff's suggestion that some portion of ***Howards*** remained "good law" following ***Reichle*** (or now ***Lozman***) is a far cry from providing the specific guidance for officers necessary to deny them qualified immunity. ***See Reichle***, 566 U.S. at 665 ("[W]e have previously explained that the right allegedly violated must be established, 'not as a broad general proposition,' but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official.").

II. The Amended Compliant Fails to State a Claim for Wrongful Arrest and Qualified Immunity Applies

Plaintiff's arguments regarding probable cause are addressed above. The Response does not directly address the argument that the group pleading in the Amended Complaint impermissibly suggests that because each of the officers was present at the scene, they all must be responsible for each alleged constitutional violation. Instead, Plaintiff points to a series of cases from New York and Connecticut which allow "collective allegations," and suggests the Tenth

[6] Considering "whether the existence of probable cause bars [a] First Amendment retaliation claim," the ***Lozman*** Court noted the issue raises "difficult questions about the scope of First Amendment protections when speech is made in connection with, or contemporaneously to, criminal activity[.]" Slip Op. at 6, 10. The Court then stated its determination "must await a different case" and ruled instead on the even more narrow (and inapplicable to the instant matter) ground that the City maintained an unconstitutional municipal policy motivated by retaliation which "separates Lozman's claim from the typical retaliatory arrest claim." ***Id***., 10-11.

Circuit has followed suit amid allegations of "active and joint" participation in a coordinated, group violation. (Response at 4.) However, the sole case Plaintiff cites is distinguishable, as it involved review of a summary judgment determination regarding an excessive force claim and the Court's determination that because all officers directly applied force in a specified manner, they could all be found liable for the overall use of force. *See* ***Walter v. Gomez***, 745 F.3d 405 (10th Cir. 2014). ***Walter*** has never been applied outside the context of a claim of excessive force resulting in an indivisible injury from a single event to alleviate a plaintiff's long-recognized obligation to specifically identify the acts of each individual defendant which violated his constitutional rights, and Plaintiff has not provided any justification to do so here.[7]

Moreover, Plaintiff cannot overcome Defendants' assertion of qualified immunity. Plaintiff points to no case which is remotely similar to the allegations in the Amended Complaint to demonstrate violation of a clearly established right. The ***Hill*** and ***Norwell*** cases do not address wrongful arrest claims or consideration of underlying probable cause, but relate merely to the constitutionality of another city's ordinance regarding interference with police business and a fact-dependent appeal of a criminal charge for disorderly conduct. ***Hill***, 482 U.S. 451 (1987); ***Norwell***, 414 U.S. 14 (1973). The holdings in the ***Buck*** and ***Dempsey*** cases cited in the Response are also highly fact-specific and limited to participation of single individuals within a large, peaceful protests. This is distinguishable from Plaintiff's allegations which, at a minimum, include his failure to obey officers' orders upon learning he was under arrest and use of the fence as an instrument of obstruction of the officers' duties. ***Buck v. City of Albuquerque***, 549 F.3d 1269 (10th Cir. 2008); ***Dempsey v. People***, 117 P.3d 800 (Colo. 2005).

[7] *See* ***Matthews v. Bergdorf***, 889 F.3d 1136, 1144, 1148 (10th Cir. 2018) ("A complaint that fails to differentiate wrongful acts among multiple defendants, alleging instead multiple violations by unspecified defendants does not provide the fair notice the law requires."), *citing* ***Robbins v. Okla.***, 519 F.3d 1342 (10th Cir. 2008).

III. Plaintiff Cannot Sustain His Malicious Prosecution Claim, Which Is Also Subject to Qualified Immunity.

Plaintiff's reliance on a "simplified misdemeanor criminal procedure" is a misnomer which has no effect on the attenuation between the arresting officer and a criminal prosecution. First, Plaintiff was charged with a class 6 felony, which would have rendered the simplified *misdemeanor* procedure irrelevant or, at least, allowed him an avenue to request an adversarial preliminary hearing. Regardless, the mere fact an abridged criminal procedural mechanism was in place does not eliminate the requirement for direct causation between each arresting officer and the continued prosecution of the charges. The Amended Complaint and documents publicly available demonstrate a prosecutor and district court judge were involved within days of the arrest, breaking the chain of causation between the officers and the prosecution. *See* ***Taylor v. Meacham***, 82 F.3d 1564 (10th Cir. 1996). Plaintiff's allegation Defendant Chernak made unspecified misrepresentations in his arrest which "infected" the probable cause evaluation are wholly conclusory and can neither form the basis for a malicious prosecution claim nor overcome Defendants' assertion of qualified immunity. ***Handy v. Pascal***, 17-CV-708-WYD-KMT (D. Colo. Aug. 29, 2011)("Plaintiff's conclusory 'blanket statement' that Defendant Pascal gave false and misleading testimony, 'without identifying [] the content of the false testimony' is insufficient to state a plausible claim for relief.")

Plaintiff's reliance on an alleged statement by an unnamed prosecutor in a telephone call related solely to the trespass charge fails to sufficiently to meet the element that the charges were terminated in his favor. *See, e.g.*, ***Jones v. Lehmkuhl***, 2013 U.S. Dist. LEXIS 139229, *89 (D. Colo. April 26, 2013)("Because a favorable termination requires some form of disposition "which indicates the innocence of the accused," a prosecutor's election to dismiss charges, standing alone,

does not necessarily equate to a favorable termination." As argued in the Motion, the allegations in the Amended Complaint regarding this element are conclusory.

Despite the Response's recitation of determinations in other circuits, the Tenth Circuit has not definitively addressed whether a charge-by-charge probable cause determination is appropriate for malicious prosecution claim. ***Van de Weghe v. Chambers***, 569 Fed. Appx. 617, 620 (10th Cir. 2014) ("[T]his court hasn't definitively spoken to the question either way."). Nonetheless, because each charge for Plaintiff's arrest was supported by probable cause, as determined by a magistrate judge and argued in Defendants' Motion, Plaintiff still cannot maintain his claim. ***Anthony v. Baker***, 808 F. Supp. 1523, 1526 (D. Colo. 1992) (holding existence of probable cause is complete defense to malicious prosecution claim). Moreover, Plaintiff's argument that each separate charge could form the basis for a malicious prosecution claim still cannot defeat Defendants' assertion of qualified immunity. The ***Van de Weghe*** Court was unequivocal in its statement that the law on this subject is not clearly established for purposes of qualified immunity. *Id*. Plaintiff has cited no Tenth Circuit authority, nor are Defendants aware of any, since ***Van de Weghe*** which addresses circumstances sufficiently similar to establish any of Defendants' actions violated Plaintiff's recognized constitutional rights.

Dated: June 20, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 20th day of June, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Raymond K. Bryant
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s/ Nicole Marion, Legal Assistant to
Christina S. Gunn, Esq. of
Hall & Evans, L.L.C.