

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,
MIKE HOWARD, and
MATTHEW BROUGH,

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTION TO THE MAGISTRATE
JUDGE'S RECOMMENDATION**

Defendants Matthew Chernak, Mike Howard and Matthew Brough, by and through their counsel, Thomas J. Lyons, Esq., and Christina S. Gunn, Esq., of Hall & Evans, L.L.C., hereby respectfully submit this Response to Plaintiff's Objection to the Magistrate Judge's Recommendation, as follows:

INTRODUCTION

This case arises from Defendants' arrest of Plaintiff on January 26, 2016 during an incident involving Plaintiff's presence and conduct in an area ultimately determined to be public property but enclosed at the time, by a fence.¹ Plaintiff's Amended Complaint asserts three claims for relief: 1) a claim pursuant to 42 U.S.C. § 1983 for retaliation for

¹ Rather than fully recite the allegations involved in this case again, Defendants refer to the allegations in Plaintiff's Complaint and Amended Complaint and incorporate Defendants' discussion of the facts found in their Motion to Dismiss the Amended Complaint [ECF 17] as well as the Magistrate Judge's Recommendation [ECF 43]. See Fed. R. Civ. P. 10(c) (permitting adoption by reference).

Plaintiff's First Amendment Expression; 2) a claim pursuant to 42 U.S.C. § 1983 alleging a violation of Plaintiff's Fourth Amendment rights on the basis of unlawful arrest and detention; and 3) a claim pursuant to 42 U.S.C. § 1983 alleging a violation of Plaintiff's Fourth Amendment rights on the basis of wrongful and malicious prosecution.² The Defendants filed a Motion to Dismiss arguing Plaintiff failed to state an adequate claim for relief and they were entitled to qualified immunity because, among other reasons, they had probable cause to arrest Plaintiff, the state of law regarding whether a Plaintiff has a right to be free from retaliatory arrest otherwise supported by probable cause is unsettled, and Plaintiff had failed to meet the elements of his malicious prosecution claim.

Magistrate Judge Kristen Mix issued a Recommendation [ECF 43] recommending that Defendants' Motion to Dismiss be granted and all of Plaintiff's claims against Defendants be dismissed for the following reasons: 1) Defendants had probable cause to arrest Plaintiff; 2) the law regarding whether Plaintiff had a right to be free from retaliatory arrest otherwise supported by probable cause was not settled at the time of Plaintiff's arrest, and therefore the Defendants were not on notice of a clearly established right; 3) Plaintiff's assertion that the Defendants were required to have probable cause for every crime with which they charged Plaintiff in order to lawfully arrest him is incorrect; and 4) there is no clearly established law in the Tenth circuit establishing that a claim for malicious prosecution may lie where one charge is supported by probable cause but another is not. Plaintiff now objects to the Magistrate Judge's Recommendation, arguing the officers did not have probable cause to arrest Plaintiff and therefore they are not

² Defendants incorporate their Summary of Amended Complaint's Allegations as set forth in their Motion to Dismiss, [ECF 17]. Fed. R. Civ. P. 10(c).

entitled to qualified immunity; that the Magistrate Judge improperly analyzed the state of the law regarding whether a plaintiff is entitled to be free from retaliatory arrest otherwise supported by probable cause, and the Magistrate Judge should have considered the weight of authority from other jurisdictions and found that Plaintiff had sufficiently alleged a claim for malicious prosecution on the remaining charges even if Defendants had probable cause for one or more of the charges. However, because the Magistrate Judge's reasoning was correct and supported by a reasoned analysis and controlling authority, Plaintiff's arguments fail on all counts and this Court should adopt the Recommendation.

STANDARD OF REVIEW

Under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), this Court must make a *de novo* determination of any dispositive conclusions of law or findings of fact in a Magistrate Judge's recommendation. See, e.g., **Phillips v. Beierwaltes**, 466 F.3d 1217, 1222 (10th Cir. 2006) (quoting **First Union Mortgage Corp v. Smith**, 229 F.3d 992, 995 (10th Cir. 2000)); **Cassidy v. Millers Cas. Ins. Co.**, 1 F. Supp. 2d 1200, 1205 (D. Colo. 1998). Absent an objection to a factual finding or legal conclusion in a recommendation, a party waives appellate review of both factual matters and legal questions. **Morales-Fernandez v. INS**, 418 F.3d 1116, 1119 (10th Cir. 2005); see **Thomas v. Arn**, 474 U.S. 140, 155 (1985); **United States v. One Parcel of Real Prop.**, 73 F.3d 1057, 1059-60 (10th Cir. 1996); **Green Tire Fin. Corp. v. Arndt**, 72 F. Supp. 2d 1278, 1281 (D. Kan. 1999). Issues raised for the first time in an objection to the magistrate judge's recommendation generally are deemed waived. **Marshall v. Chater**, 75 F.3d 1421, 1426 (10th Cir. 1996).

ARGUMENT

A. The Magistrate Judge Correctly Found Defendants had Probable Cause to Arrest Plaintiff, Which Requires Dismissal of Each of Plaintiff's Claims

While a determination of whether officers had probable cause to arrest a Plaintiff in a civil rights suit is within the province of the jury in a civil rights case, the existence of probable cause may still be decided as a matter of law where there is only one reasonable determination regarding the issue. ***Asten v. City of Boulder***, 652 F.Supp. 2d 1188, 1201 (D.Colo. Aug. 26, 2009), *citing* ***Bruner v. Baker***, 506 F.3d 1021, 1028 (10th Cir. 2007). Moreover, relevant here, the Court may consider the existence of probable cause related to its determination of the threshold question for qualified immunity of whether the arresting officer's conduct was "objectively reasonable." ***Cortez v. McCauley***, 478 F.3d 1008, 1120 (10th Cir. 2007). Although Plaintiff argues Defendants should have been required to thoroughly investigate and ensure that they had probable cause that Plaintiff was guilty of every element of every offense with which they charged him prior to making the arrest, this is not the state of the law. The facts in the Amended Complaint establish, as the Magistrate Judge correctly points out, that Plaintiff's conduct was sufficient to establish a reasonable belief by Defendants that they had probable cause to arrest him for multiple offenses, including but not limited to obstruction a police officer, resisting arrest and disorderly conduct. [ECF 43 at 25-26]; ***Kilgore v. City of Stroud***, 158 F. App'x 944, 948 (10th Cir. 2005).

Nonetheless, Plaintiff sought in his Response to the Motion to Dismiss Amended Complaint and Objection to the Recommendation to unnecessarily parse each element of each the criminal charges against him in an effort to defeat probable cause, while ignoring the variety of ways his own behavior constituted criminal acts (both charged *and*

uncharged) throughout the incident. [See ECF 17 at 5-8; ECF 28 at 2-5, citing criminal statutes and municipal code violations applicable to Plaintiff's behavior admitted in Amended Complaint.] Although Defendants later learned the fence was improperly erected without City approval, their inference that it legally protected private property and, thus, Plaintiff was trespassing, was reasonable at the time. The criminal trespass charge aside, they certainly had probable cause to arrest him for, at a minimum, disorderly conduct and obstructing a peace officer. See C.R.S. § 18-9-106(a) and C.R.S. § 18-8-104. The Amended Complaint establishes *inter alia* that Plaintiff was yelling and using profanity on the street after midnight; that he had placed an obstacle in the form of the fence, between himself and the officers; that he refused the command to return over the fence after being advised he was under arrest. [ECF 14 at ¶¶ 43-44, 54, 73; ECF 17-1, Ex. A.] Thus, the Recommendation properly determined that the Amended Complaint demonstrates a reasonable belief in the existence of probable cause by Defendants that Plaintiff had committed, at a minimum, obstruction of a peace officer, resisting arrest and disorderly conduct. [ECF 43 at 24-26.]

Plaintiff attempts to muddy the waters by enumerating all the steps Plaintiff believes Defendants could or should have taken to further investigate potential charges before arresting him. Plaintiff's assertions would lead to an absurd result, forcing law enforcement officers to examine every conceivable piece of information prior to making an arrest. The Recommendation properly determined this is not the standard. [ECF 43 at 20, 24-25.] Plaintiff's assertions of what he believes the officers should have done are mere conclusory statements based on assumptions about steps he believes were possible for Defendants to have taken, and completely ignores the practicalities of the

situation and time of day. Since Plaintiff neither attached the email alleged to be from the City Engineer to his Amended Complaint, nor quoted it, Plaintiff appears to expect the reader to make an assumption that the email could not have been susceptible to a concern by officers regarding its authenticity, and that it clearly identified the area where he stood in a way that the officers, who were not parties to the communication, could understand. While the Court must accept Plaintiff's allegations as true for the purposes of a Motion to Dismiss, the Court is not required to, and indeed should not, make inferences and assumptions not supported by the allegations. ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544, 557, 127 S. Ct. 1955, 1966 (2007).

Plaintiff then argues Defendants should have called various city officials to verify the information, but ignores the fact that this encounter took place just after midnight, when the city offices were closed and the officials were likely sleeping. [ECF 17-1 at 2].³ As the Recommendation states, Defendants were not required to credit Plaintiff's explanation in the face of probable cause to make the arrest despite the explanation. [ECF 43 at 24 (collecting cases).]

Further, although Plaintiff avers the Amended Complaint alleges the Defendants "were informed of the issues regarding the public plaza through internal meetings" [ECF 47 at 7], there is no allegation the information contained in the alleged emails from city

³ The Court should also consider the allegations in Plaintiff's original complaint, which was amended after Defendants filed their initial Motion to Dismiss to eliminate certain allegations giving rise to probable cause. [ECF 17 at 4-5.] See ***Aasen v. Drm***, 2010 U.S. Dist. LEXIS 68054 *7(N.D. Ill. July 8, 2010) (where a plaintiff filed an amended complaint which omitted factual allegations demonstrating probable cause existed for arrest in response to a motion to dismiss his Section 1983 claim, the court nonetheless considered the allegations contained in the original complaint where no evidence of mistake existed for the deletions from the amended complaint).

officials was passed on to these officers during such internal meetings. This wholly conclusory allegation stands in direct contrast to the Recommendation's common-sense analysis of those facts that were properly pled in the Amended Complaint. [See ECF 43 at 22 ("The Court agrees with Defendants that accepting these facts as true strains credulity to expect that Defendants would have known of the illegality of the fence just two days after Chief Inspector Moseby allegedly made this determination and informed Plaintiff." (citations omitted)]. In fact, based on the information in the Amended Complaint and the Affidavit in Support of Warrantless Arrest [ECF 47], it appears that the officers reasonably believed the area enclosed by the fence to be private property. For these reasons, as well as those proffered in Defendants' Motion to Dismiss and Reply in Support thereof, the Defendants had probable cause to arrest Plaintiff and the Court should adopt the Magistrate Judge's Recommendation.

B. The Defendants are Entitled to Qualified Immunity

Qualified immunity protects governmental officials from civil liability so long as their conduct does not violate clearly established Constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Once a defendant asserts qualified immunity, the plaintiff must initially make a twofold showing. She must first show the defendant's alleged conduct violated the law. Second, she must show the law was clearly established when the alleged violation occurred. *Derda v. City of Brighton*, 53 F.3d 1162, 1164 (10th Cir. 1995) (internal quotes and citations omitted); *Laurienti v. Bicha*, 2016 U.S. Dist. LEXIS 15651 (D. Colo. Feb. 9, 2016)(citing *DeSpain v. Uphoff*, 264 F.3d 965, 971)(10th Cir. 2001).

The Recommendation determined Defendants are entitled to qualified immunity on each of Plaintiff's claims, in addition to its finding that the existence of sufficient facts

in the Amended Complaint to support a reasonable inference that Defendants had probable cause for the arrest defeated the malicious prosecution claims. [ECF 43 at 28.] Defendants' Motion to Dismiss also argued failures of Plaintiff's Amended Complaint to state a claim or properly plead elements of his claims, which were not addressed by the Recommendation. [See, e.g. ECF 17, pp. 8-9, 12, 14-15; ECF 28 5-6, 9.] While Defendants do not waive those arguments here, the Recommendation properly determined that the existence of probable cause defeats each of Plaintiff's claims either as an element of the claim or by constituting the first inquiry in the qualified immunity analysis. As discussed *supra*, the Defendants did not violate Plaintiff's constitutional rights because they had probable cause to arrest him. This is true even if the Defendants' only believed they had probable cause. See **Cortez v. McCauley**, 478 F.3d 1108, 1120-21 (10th Cir. 2007). ("Law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity."). See also **Stonecipher v. Valles**, 759 F.3d 1134, 1141 (10th Cir. 2014) (Plaintiff's arrest is constitutional so long as Defendant had arguable probable cause.).

Further, as discussed in Sections C and D, below, the law with regard to whether a plaintiff may pursue claims for retaliatory arrest or malicious prosecution when defendants had probable cause to arrest him is not clearly established in the Tenth Circuit. Therefore, Defendants are entitled to qualified immunity and Plaintiff's claims against them must be dismissed. [See ECF 17 at 9-10, 11, 13.]

C. The Magistrate Judge Correctly Found that the law Regarding Whether an Arrest Supported by Probable Cause May Premise a Claim for Retaliatory Arrest under the First Amendment was not Clearly Established at the Time of Plaintiff's arrest.

Plaintiff incorrectly argues that the law is clear that an allegedly retaliatory arrest, even where otherwise supported by probable cause, is not permitted. The fact that Plaintiff spends more than a page of his Objection discussing the state of the law in this area blatantly contradicts his argument that the law is clear. Plaintiff argues that the Tenth Circuit's decision in *Howards v. McLaughlin*, is still good law for the proposition that the existence of probable cause does not nullify a suit for retaliatory arrest. 634 F.3d 1131 (10th Cir. 2011). However, as noted in the Recommendation, this is a dramatic oversimplification. In *Reichle v. Howards*, the Supreme Court stated, "here, 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 from a retaliatory arrest that is otherwise supported by probable cause. *This Court has never held that there is such a right.*" 556 U.S. 658, 665-670 (2012). Based on this language, a reasonable officer could not be expected to understand that a retaliatory arrest, otherwise supported by probable cause, was impermissible.

Plaintiff's Objection glaringly fails to address *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), in which the U.S. Supreme Court found that a retaliatory arrest suit could proceed where the allegations included an official policy of retaliation without addressing retaliatory arrest claims in other contexts. As the Magistrate Judge correctly points out, *Lozman* demonstrates this issue has not been fully resolved by the Supreme Court.⁴ The Recommendation contains an extensive, reasoned analysis of the evolution

⁴ Defendants further incorporate the numerous cases cited by the Magistrate Judge on pages 17-18 of the Recommendation, holding that this area of law has not been clearly decided.

of the law on the “difficult questions about the scope of First Amendment protections when speech is made in connection with, or contemporaneously to, criminal activity.[.]” *Lozman*, 138 S.Ct. at 1953-54. Plaintiff’s Objection misstates the evolution of the *Howards* matter; Defendants refer the Court to the historical summary in their Motion to Dismiss. [ECF 17 at 2-3.] Nonetheless, this Court need not untangle this legal knot; qualified immunity requires the right in question to make clear to a reasonable officer that his conduct was unlawful in the situation. As determined in the Recommendation, there can be no doubt the uncertainty in the law debated by the parties means the right alleged by Plaintiff was not “clearly established” at the time of his arrest. Because this area of law is still unclear, the Court should adopt the Magistrate Judge’s Recommendation and grant the Defendants’ Motion to Dismiss.

D. The Magistrate Judge properly found that Plaintiff’s Claim for Malicious Prosecution Fails Because the Defendants had Probable Cause to Arrest Him for a Crime

Plaintiff argues that the law regarding whether a plaintiff may pursue a malicious prosecution claim on one charge when probable cause supports another is well-settled. In support of this argument, Plaintiff relies on the unpublished decision in *Miller v. Spiers* for the proposition that Plaintiff may pursue a malicious prosecution case based on one charge even if there was probable cause for his arrest on other charges. 339 Fed. Appx. 862 (10th Cir. 2009). Plaintiff additionally relies on other non-binding law from other circuits and district courts, while discounting the Tenth Circuit’s decision, less than two years prior to his arrest, in *Van de Weghe v. Chambers*, 569 Fed. Appx. 617 (10th Cir. 2014). In *Van de Weghe*, the Court found that the Plaintiff could not meet the “clearly established law” element of his malicious prosecution claim because the law on whether a Plaintiff can pursue a malicious prosecution claim on one charge while others were

supported by probable cause is not clearly established. *Id.* at 620. See also ***Derda v. City of Brighton***, 53 F.3d 1162, 1164 (10th Cir. 1995). The ***Van de Weghe*** Court acknowledged the finding in ***Miller***, but pointed out that it was not a binding decision, since it was unreported, and further noted the ***Miller*** Court's failure to acknowledge the split among other circuits. ***Van de Weghe***, 569 Fed. Appx. at 620.

Plaintiff would have the Court hold that the Defendants were on notice of "clearly established law" based on the standard applied in some, but not all, other circuits and in spite of Tenth Circuit law that plainly states the law is unsettled in this area. The Court should disregard Plaintiff's argument in favor of only the law that helps his position, and adopt the Magistrate Judge's Recommendation with regard to dismissal of Plaintiff's malicious prosecution claim.

CONCLUSION

Plaintiff failed to allege sufficient facts to state a claim for a relief and to overcome Defendants' assertion of qualified immunity. Defendants had probable cause to arrest Plaintiff and, even if the arrest were retaliatory in nature, the law in the Tenth Circuit is unsettled with regard to whether a plaintiff has a right to be free from retaliatory arrest and prosecution where at least one charge is supported by probable cause. Therefore, Plaintiff's claims against Defendants should be dismissed.

WHEREFORE, for the foregoing reasons, Defendants respectfully request that the Court adopt the Magistrate Judge's Recommendation in its entirety, grant Defendants' Motion to Dismiss, dismiss all of Plaintiff's claims against them, and afford them such other and further relief as the Court deems appropriate.

Dated this 25th day of March, 2019.

Respectfully submitted,

s/ Christina S. Gunn

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 25th day of March, 2019, 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:

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