IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOANNA CASTRO,
PLAINTIFF

V.

Case No. 5:18-CV-312-JKP-ESC

ALBERT SALINAS,
DEFENDANT

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE DISTRICT COURT JUDGE OF SAID COURT:

Plaintiff Joanna Castro opposes the defendant's Motion for Summary Judgment in this §1983 Civil Rights action, and would show as follows:

I. Summary of the Argument

On February 20, 2018, Joanna Castro went to Olmos Park to film activist Jack Miller exercise his right to open carry.[1] *Plf. Ex. A, at 1*. Defendant Salinas, an Olmos Park Police Department Officer, was one of two Olmos Park officers to arrive where Miller was open carrying to arrest Miller. *Id*. It is undisputed that Salinas focused on Joanna Castro when Salinas exited his vehicle, pointed his rifle at her, shoved her, and yelled at her to put her camera down, then turned his back on her demonstrating he did not consider her a threat. *Def. MSJ, at 4 ¶7*; *and Def. Ex. C-3, 01:01:28-01:01:37*. This lawsuit is exceedingly simple. Joanna Castro had a clearly established First

[1] *See* Tex. Penal Code §46.02, which does not criminalize the carrying of a long gun.

Amendment protected right to film the police that Defendant Salinas infringed upon by slapping the camera out of her hand to prevent her from filming Salinas and his fellow officer. *Plf. Ex. A, at 2* ¶*9*. Salinas retaliated against Joanna Castro for exercising her First Amendment protected right to film by filing a false charge against her, when it is clear from the defendant's video exhibits that Joanna Castro complied with Salinas's orders and did not interfere in the arrest of Jack Miller. And, no amount of force was appropriate under these circumstances because Joanna Castro was not interfering with the arrest, nor was she committing any other crime.

II. Qualified Immunity

A state actor may be held liable for civil rights violations if his actions violate clearly established constitutional rights. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but is to say that in light of preexisting law the unlawfulness must be apparent." *Id*. at 640. This Court applies a two-part test: 1) whether a violation of an actual constitutional right is alleged, and 2) whether the right was clearly established at the time of the violation. *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008). These are questions of law. *Brothers v. Zoss*, 837 F.3d 513, 517 (5th Cir. 2016).

III. Clearly Established Constitutional Rights

A. Freedom from Baseless Arrest

"The right to be free from arrest without probable cause is a clearly established constitutional right." *Mangieri v. Clifton*, 29 F.3d 1012, 1016 (5th Cir. 1994). An arrest is constitutional if, and only if, "the facts and circumstances within [Defendants'] knowledge and of which they had

reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [Plaintiffs] had committed or [were] committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

B. Freedom to Assemble in Public, Criticize the Government, & Film Government Agents

The First Amendment to the United States Constitution provides that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. The First Amendment is made applicable to the States via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925). The Texas Constitution likewise protects our right to free speech: "Every person shall be at liberty to speak, write, or publish his opinion on any subject, … and no law shall ever be passed curtailing the liberty of speech or of the press." Tex. Const. art. I, § 8.

Both the Texas and United States Constitutions protect our right to assemble together in a public place. Tex. Const. art. I, § 27; U.S. Const. amend. I & XIV; *United States v. Cruikshank*, 92 U.S. 542 (1876) ("The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government."). Any restrictions on public fora are closely scrutinized and are valid only if content neutral and necessary to serve a compelling government interest. *See United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967).

Simply: We have a right to be present in a public forum. And, sidewalks are quintessential public fora. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44 (1983).

Likewise, we have a right to speak on matters of public concern. *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (citation omitted). Our nation is committed to the foundational principle that

"debate on public issues should be uninhibited, robust, and wide-open." *Id*. (citation omitted). Our speech addresses a matter of public concern when it relates to "any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest." *Id*. (citation omitted). Speech regarding alleged police misconduct constitutes a matter of public concern. *Teague v. City of Flower Mound*, 179 F.3d 377, 381 (5th Cir. 1999). "There is perhaps no subset of matters of public concern more important … than bringing official misconduct to light." *Branton v. City of Dallas*, 272 F.3d 730, 740 (5th Cir. 2001).

Therefore, we have a right to gather in a public forum and to speak regarding alleged police misconduct.

Furthermore, our right to gather information is co-equal with our right to convey information. *de la O v. Hous. Auth. Of El Paso*, 417 F.3d 495, 503 (5th Cir. 2005) (citation omitted). The government and its agents may not limit "the stock of information from which the members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). The First Amendment protection for news-gathering "cannot turn on professional credentials or status." *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). At this point in history, "news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper." *Id*. It necessarily follows that we all have the same right as a member of the press to gather information. *Id*. at 83. In sum:

1) We have the right to be peacefully present in a public place;

2) We have the right to gather information in that public place;

3) We have the right to report on that information as if we were members of the press;

and

4) Our speech is most highly valued and protected when it addresses official/police misconduct.

Our jurisprudence clearly established that an arrest must be based on probable cause long before February 20, 2018, providing that filming the police is not enough to supply probable cause. *Turner v. Lieutenant Driver*, 848 F.3d 678, 694 (5th Cir. 2017). "Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Id*. (citation omitted). *Turner* involved an activist filming the police in a public place, and the Fifth Circuit concluded that the police did not have probable cause to arrest him for an offense under those circumstances. *Id*. Here, similarly, no objectively reasonable officer would believe he had probable cause to arrest Plaintiff Castro based on the undisputed facts from the video evidence, including:

1. Castro was holding cameras, and Defendant Salinas knew they were cameras, evidenced by his oral order for her to put her camera down,

2. Defendant Salinas did not at any point on February 20th indicate that he was confused about what Castro was holding in her hands, but evidenced his knowledge that she was holding a camera by ordering her to put the camera down,

3. Defendant Salinas did not arrest Castro on February 20th for interference, nor did he make any move to arrest her until long after February 20th,

4. The other officer on the scene explicitly told Salinas to not worry about Plaintiff

Castro's camera/filming, and Salinas immediately left Castro after the other officer told him not to worry about her,

5. Defendant Salinas turned his back on Plaintiff Castro after slapping her cameras, evidencing that he did not view her as a threat (nor did the other officer view her as a threat by ignoring her and telling Salinas not to worry about her).

Note, that it has been clearly established law in Texas that this type of fact pattern does not support a charge of interference under Texas Penal Code §38.15. *Carney v. State*, 31 S.W.3d 392 (Tex. App.—Austin 2000, *no pet.*) (holding a conviction for interference not supported by legally sufficient evidence when the defendant merely stalled the officers with First Amendment protected speech but did not physically block them).

It is of no moment that third parties witness the speech or react to it. The First Amendment knows no 'heckler's veto.' *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001); *see Def's Motion to Dismiss* (Dkt. #19 at 10) (calling for a heckler's veto for the burglars that they call "witnesses"). The defendant belabors the point about other parties' involvement in this case. Third parties have no right to a hecklers veto.

The facts in the case at bar are the same as in *Turner*, as well as other First Amendment filming cases like *Glik v. Cunniffe*, 655 F.3d 78, 80 (1st Cir. 2011) (Glik was standing roughly 10 feet away from officers making arrest, as Glik filmed the officers). No objectively reasonable officer under the circumstances here would believe that Plaintiff Castro interfered with Defendant Salinas, or that an objectively reasonable officer would otherwise find probable cause for an arrest.

C. Freedom from Retaliation for Exercising First Amendment Right to Film

The First Amendment prohibits "adverse governmental action against an individual in retaliation for the exercise of protected speech activities." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). A plaintiff claiming retaliation had been required to show that 1) the plaintiff was "engaged in constitutionally protected activity, 2) the defendants actions caused [her] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and 3) the defendants' adverse actions were substantially motivated against the plaintiff's exercise of constitutionally protected conduct." *Id*. (citations omitted).

It is undisputed that Joanna Castro was engaging in First Amendment protected activity – filming Defendant Salinas and his fellow officer. It is likewise undisputed that Castro suffered an injury that the Fifth Circuit in *Keenan* held sufficient to chill an ordinary person from exercising First Amendment rights, specifically, she suffered an arrest. The question of whether Salinas was motivated by Joanna Castro's exercise of her right to film can be answered by the video exhibits Salinas attaches to his Motion for Summary Judgment, wherein he ordered Joanna Castro to put her camera down and slapped it out of her hand. *And, see Plf. Ex. A, at 2 ¶9*.

This standard seems to be changed by the Supreme Court's holding in *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019). There is an exception to the general requirement that the plaintiff in a retaliation case must prove a lack of probable cause for arrest: "a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. In such cases, an unyielding requirement to show the absence of probable cause could pose 'a risk that some police officers may exploit the arrest power as a means of suppressing speech.'" *Id*. at 1727 (citation omitted). In this very case, Salinas did not arrest Joanna

Castro on February 20, 2018, showing the discretionary nature of the charge. Nevertheless, there was no probable cause for her arrest. *See Carney*.

D. Excessive Force

A Fourth Amendment excessive force claim is considered separately from a claim for unlawful arrest. *Freeman v. Gore*, 483 F.3d 404, 417 (5th Cir. 2007). Courts analyze a claim that an officer used excessive force to effectuate an arrest under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989). A plaintiff must prove the following in her excessive force claim: 1) an injury, 2) resulting from the use of force that was clearly excessive to the need for force, 3) that was objectively unreasonable. *Ikerd v. Blair*, 101 F.3d 430, 433-34 (5th Cir. 1996). This calculus "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (citing *Graham*, 490 U.S. at 396).

It is clearly established Constitutional law that "the need for force determines how much force is constitutionally permissible." *Bush v. Strain*, 513 F.3d 492, 501 (5th Cir. 2008). Objectively, the facts in this case show there was no need for **any** force.

Plaintiff Castro has suffered psychological damages. *Plf. Ex. A, at 3 ¶20*. *See Flores v. City of Palacios*, 381 F.3d 391, 397-98 (5th Cir. 2004) (holding psychological injuries can be sufficient). Significant physical injuries are not required for an excessive force claim. *Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005).

Regarding "the severity of the crime at issue:" the offense of arrest was a Class B misdemeanor, which the defendant did not see fit to arrest Joanna Castro for at the time he claimed

she interfered, and the video evidence evidences no interference. *See Carney v. State*, 31 S.W.3d 392 (Tex. App.—Austin 2000, *no pet.*) (holding a conviction for interference not supported by legally sufficient evidence when the defendant merely stalled the officers with First Amendment protected speech but did not physically block them). The context of the force factors into whether the injury is *de minimis*. *Williams v. Bramer*, 180 F.3d 699, 704 (5th Cir. 1999) (even momentary lightheadedness is more than *de minimis* when there was no reason to choke the person). Here, as the video evidence shows Joanna Castro backing away from Salinas as he barked his orders, and Jack Miller was peacefully arrested several feet away, there was no need for any force under the circumstances.

Defendant Salinas misstates clearly established law regarding when a seizure occurs. *Def. MSJ, at 9*. It has long been clearly established that **some** touching by a police officer, no matter how slight, constitutes a seizure of a person. *California v. Hodari*, 499 U.S. 621, 625 (1991); *and see Fontenot v. Cormier*, 56 F.3d 669, 674 (5th Cir. 1995). By shoving Joanna Castro, Defendant Salinas seized her. There is no good faith argument otherwise.

IV. Declaratory Relief

Qualified immunity is a defense to claims for monetary relief, not declaratory relief. *Robinson v. Hunt Cnty., Tex.*, 921 F.3d 440, 442 (5th Cir. 2019). Joanna Castro also seeks declaratory relief that her rights were violated. *Dkt. #17, at 11 ¶36*.

PRAYER: Joanna Castro prays that Defendant Salinas's Motion for Summary Judgment be DENIED.

Respectfully Submitted,
PLAINTIFF

By:
/s/ *Millie L. Thompson*
Millie L. Thompson
Texas State Bar Number: 24067974
The Law Office of Millie L. Thompson
1411 West Ave., Ste. 100
Austin, Texas 78701
Telephone: (512) 293-5800
Fax: (512) 682-8721
Email: millieaustinlaw@gmail.com

Certificate of Service

I, Millie Thompson, do hereby certify that on November 4, 2019, a true and correct copy of this Plaintiff's Response to Defendant's Motion for Summary Judgment was served on all parties of record via email to

Denton Navarro Rocha Bernal & Zech
2517 N. Main Ave.
San Antonio, TX 78212
(210) 227-3243
F (210) 225-4481
Patrick.bernal@rampage-sa.com
Adolfo.ruiz@rampage-sa.com

/s/ *Millie L. Thompson*
Millie Thompson, Plaintiff's Attorney