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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SASHA CRONICK,

Plaintiff - Appellee,

v.

CHRISTOPHER PRYOR; ROBERT MCCAFFERTY,

Defendants - Appellants,

and

MICHAEL INAZU,

Defendant.

No. 23-1238

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:20-CV-00457-CMA-MDB)

Ryan D. Doherty, Office of the City Attorney, City of Colorado Springs, Colorado, for Defendants-Appellants.

Reid R. Allison (David A. Lane, with him on the brief), Killmer, Lane, LLP, Denver, Colorado, for Plaintiff-Appellee.

Before **TYMKOVICH**, **MATHESON**, and **BACHARACH**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Colorado Springs Police Officers Robert McCafferty and Christopher Pryor responded to a 911-call placed by Sasha Cronick reporting a drug overdose. The officers arrived at the Sun Springs Motel to find Ms. Cronick at the scene. Officer Pryor questioned her and the conversation quickly escalated. She was arrested for failure to desist and disperse in violation of Colorado Springs Code § 9.2.103.

Ms. Cronick brought a 42 U.S.C. § 1983 claim alleging the officers violated her constitutional rights. The district court denied the officers' assertion of qualified immunity. We affirm. The facts are disputed whether the responding officers issued an order to Ms. Cronick and, even assuming they did, whether she defied that order. Absent a valid order—and any defiance of an order—clearly established law settles that the officers lacked probable cause to arrest her and then search her pursuant to an unlawful arrest.

I. Background[1]

On the morning of December 12, 2018, Ms. Cronick and her husband were leaving their home at the Sun Springs Motel in Colorado Springs when she heard a neighbor shout for help. A man had overdosed and was lying in the doorway of her neighbor's room. Ms. Cronick called 911 and stayed on the phone with dispatch to coach her neighbor through CPR.

Officer McCafferty arrived to find Ms. Cronick outside the motel room, standing within a few feet of the overdosing man, and using her cellphone to record

[1] These facts are taken from the district court's summary judgment order denying qualified immunity to the officers.

the scene. The paramedics arrived a few minutes later, and Ms. Cronick explained she called 911 but did not know the overdosing man. Officer McCafferty moved to investigate the motel room. He stopped a woman inside the room from packing her bags and detained her. Ms. Cronick told Officer McCafferty another individual was in the bathroom. Officer McCafferty found the unknown man and detained him as well.

As Officer McCafferty interviewed the man, Officer Pryor arrived at the motel and began speaking with Ms. Cronick. Ms. Cronick answered Officer Pryor's initial questions—she gave her name, told him she lived in the motel, that she called 911, and that she coached another woman through CPR. Officer Pryor then asked for her room number, and she said, "I'm not answering questions like that." She referenced "police harassment." Officer Pryor said he was interviewing her because she was a witness and called 911, and she responded, "I didn't witness anything, I just called." After Ms. Cronick said she did not witness anything, Officer Pryor said "Why don't you go over there? Why don't you leave the scene?"[2] Ms. Cronick responded, "I don't need to, I live here."

At this point, the district court found several disputes of fact. First, it is disputed whether Officer Pryor issued an 'order' for Ms. Cronick to leave the scene. Second, it is disputed whether Ms. Cronick was civil and helpful before speaking to

[2] The officers dispute this fact and contend Officer Pryor said, "why don't you leave, leave the immediate area." Aplt. Br. at 5. They frame it is a statement rather than a question.

Officer Pryor, or whether she was obstructing the scene and impeding the paramedics' work. And third, it is disputed whether Officer Pryor grabbed Ms. Cronick's arm to escort her away, or whether he grabbed her arm *after* she had already turned to walk away. It is, however, not disputed that Ms. Cronick yelled at Officer Pryor not to touch her, that Ms. Cronick walked toward the middle of the motel parking lot, and that Officer Pryor followed her there.

Officer McCafferty heard yelling and joined them in the parking lot. He asked Officer Pryor whether Ms. Cronick should be charged with disorderly conduct. The officers then grabbed Ms. Cronick's arms, told her she was under arrest, and handcuffed her. They conducted a pat down search and placed her in the back of a police car. A supervising officer reviewed the bodycam footage and determined she be cited and released with a summons and complaint for failure to desist or disperse. Ms. Cronick was found not guilty after a bench trial in municipal court. The municipal court judge determined Officer Pryor never issued an order.

Ms. Cronick asserts Fourth Amendment false arrest and unlawful search claims against Officers Pryor and McCafferty. The officers filed a motion for summary judgment based on qualified immunity. The district court denied the motion and the officers filed this appeal.

II. Analysis

"We review the district court's denial of a summary-judgment motion asserting qualified immunity de novo." *Wise v. Caffey*, 72 F.4th 1199, 1205 (10th Cir. 2023) (citing *Arnold v. City of Olathe, Kansas*, 35 F.4th 778, 788 (10th Cir. 2022)). Summary

judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We "view the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the nonmoving party." *Simpson v. Little*, 16 F.4th 1353, 1360 (10th Cir. 2021) (citations omitted).

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (internal quotation marks omitted). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The officers' "assertion of qualified immunity creates a presumption that they are immune from suit." *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016). To overcome this presumption, Ms. Cronick must show "(1) the officers' alleged conduct violated a constitutional right, and (2) it was clearly established at the time of the violation, such that every reasonable official would have understood, that such conduct constituted a violation of that right." *Reavis ex rel. Estate of Coale v. Frost*, 967 F.3d 978, 984 (10th Cir. 2020) (internal quotation marks omitted).

First, "[i]n the context of a false arrest claim, an arrestee's constitutional rights were violated if the arresting officer acted in the absence of probable cause that the person had committed a crime." *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012). Second, "[a]s to whether the law was clearly established at the time of the alleged violation, we require a section 1983 plaintiff to show that it would have been clear to a

reasonable officer that probable cause was lacking under the circumstances." *Id.* (internal quotation marks omitted). In other words, to determine whether Ms. Cronick's rights were clearly established, we ask whether the officers had *arguable* probable cause for an arrest. *Id.* If the officers did have arguable probable cause to arrest Ms. Cronick for failure to desist or disperse, then they are entitled to qualified immunity.

A. Constitutional Violation

The officers ask that we find probable cause to arrest Ms. Cronick for failure to obey Officer Pryor's order to leave the scene. "A warrantless arrest violates the Fourth Amendment unless it was supported by probable cause." *United States v. Johnson*, 43 F.4th 1100, 1107 (10th Cir. 2022) (citations omitted).

"An officer has probable cause to arrest a person when the facts and circumstances surrounding the situation would lead a reasonably prudent officer to believe that the arrestee has committed a crime . . . . Whether probable cause exists is determined by looking at the totality of the circumstances, based on what an objective officer would have known in the situation." *Emmett v. Armstrong*, 973 F.3d 1127, 1132 (10th Cir. 2020). "When assessing whether an officer had probable cause to arrest an individual, courts examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *A.M. v. Holmes*, 830 F.3d 1123, 1138 (10th Cir. 2016) (citations and internal quotation marks omitted).

"The denial of qualified immunity to a public official . . . is immediately appealable . . . to the extent it involves abstract issues of law." *Cox v. Glanz*, 800

F.3d 1231, 1242 (10th Cir. 2015) (quoting *Fancher v. Barrientos,* 723 F.3d 1191, 1198 (10th Cir. 2013)). Specifically, we have jurisdiction "to review (1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation." *Id.* (internal quotation marks omitted).

Our jurisdiction "is clear when the defendant does not dispute the facts alleged by the plaintiff and raises only legal challenges to the denial of qualified immunity based on those facts." *Henderson v. Glanz*, 813 F.3d 938, 948 (10th Cir. 2015) (citations omitted). But we have no interlocutory jurisdiction to review "whether or not the pretrial record sets forth a genuine issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 320 (1995). If a district court finds a genuine dispute of fact, such that a reasonable jury could find certain facts in favor of the plaintiff, we must usually take such facts as true.[3] *See, e.g.*, *Lewis*, 604 F.3d at 1225. And "the defendant must [] be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal." *Henderson*, 813 F.3d at 948 (citations omitted).

The district court determined genuine issues of material fact existed regarding whether Ms. Cronick was obstructing the scene, whether Officer Pryor issued an

[3] There are exceptions. "[W]hen the 'version of events' the district court holds a reasonable jury could credit 'is blatantly contradicted by the record,' we may assess the case based on our own *de novo* view of which facts a reasonable jury could accept as true." *Lewis v. Tripp*, 604 F.3d 1221, 1225–26 (10th Cir. 2010) (quoting *Scott v. Harris,* 550 U.S. 372, 380 (2007)). The officers raised the blatant contradiction exception at oral argument, and after our own review of the record, we do not believe Ms. Cronick's version of the facts are blatantly contradicted.!

order, and whether Ms. Cronick disobeyed an order—and these facts prevented the court from finding the officers had probable cause to arrest Ms. Cronick. We cannot review the record to determine if the district court correctly found a genuine dispute in this interlocutory posture. *Cox*, 800 F.3d at 1242; *Crowson v. Washington Cnty. Utah*, 983 F.3d 1166, 1177 (10th Cir. 2020).

The officers attempt to recast their argument as a question of law regarding whether Ms. Cronick's constitutional rights were violated. But it is clear the officers assert probable cause to arrest Ms. Cronick because, in their view, she obstructed the scene and refused to obey an order:

> During the rapidly evolving medical treatment and crime scene investigation, Pryor ordered Cronick to leave the scene when she indicated that she had no information to assist either emergent situation. But Cronick refused to comply with Pryor's order; Cronick said, "No. I don't need to. I live here[,]" and stood firmly with clear intent to disobey Pryor's order.

Aplt. Br. at 10.

The officers' argument is limited to a discussion of their version of the facts, and they fail to accept as true Ms. Cronick's version of the facts. We thus construe their appeal as a challenge to the district court's conclusion that there were genuine issues of material fact remaining as to whether there was probable cause to arrest Ms. Cronick. And "if . . . a defendant-appellant's argument is limited to a discussion of [his or her] version of the facts and the inferences that can be drawn therefrom and presents only a challenge to the district court's conclusion [p]laintiffs presented

sufficient evidence to survive summary judgment, we lack jurisdiction to consider that argument." *Henderson*, 813 F.3d at 948 (internal quotation marks omitted).

Thus, on the issue of whether there was a constitutional violation, we lack jurisdiction to review the officers' challenge to the district court's factual determinations regarding whether Ms. Cronick obeyed an order. The district court's judgment on this first prong therefore stands.

B. Clearly Established

Because we conclude probable cause was lacking, we still must determine whether Ms. Cronick's rights were clearly established by asking if the officers *arguably* had probable cause—a lower standard than actual probable cause. "Even when the district court concludes issues of material fact exist, we have reviewed the legal question of whether a defendant's conduct, as alleged by the plaintiff, violates clearly established law." *Cox*, 800 F.3d at 1242 (citations omitted). We thus have appellate jurisdiction to consider the abstract issue of whether the law was clearly established. *See, e.g.*, *Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020).

"Arguable probable cause exists where '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.'" *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 879 (10th Cir. 2014) (quoting *Fleming v. Livingston Cnty.*, 674 F.3d 874, 880 (7th Cir. 2012)) (emphasis in original). *See Holmes*, 830 F.3d at 1140 ("[I]n the § 1983 qualified-immunity context, an officer may be mistaken about whether he possesses

actual probable cause to effect an arrest, so long as the officer's mistake is reasonable—*viz.*, so long as he possesses 'arguable probable cause.'") (citations omitted); *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014) ("Arguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists."). We do not consider an arresting officer's subjective intentions. *Mocek v. City of Albuquerque*, 813 F.3d 912, 925 (10th Cir. 2015).

We conclude a reasonable officer under these circumstances would not have arguable probable cause to arrest Ms. Cronick for failure to desist or disperse. Failure to desist or disperse is committed when "any person [] intentionally, knowingly or recklessly fail[s] or refuse[s] to obey *an order* which":

> A. Is made by a peace officer while in the discharge or apparent discharge of the officer's duties;
> B. Directs that person, or a group of which that person is a member, to desist from conduct or disperse from an area; and
> C. Is *given at a time* when that person individually or with others is participating in a course of conduct or is present in an area where the conduct or presence *creates, maintains or aggravates an immediate substantial danger* of damage or injury to persons or property *or substantially obstructs* the performance of any governmental function.

Colorado Springs Code of Ordinances § 9.2.103 (emphasis added).

Drawing all reasonable inferences for Ms. Cronick, as we must do at this stage, the key facts are that Officer Pryor asked Ms. Cronick: "Why don't you go over there? Why don't you leave the scene?" Ms. Cronick replied, "I don't need to, I

live here," but immediately began to walk away. Officer Pryor then grabbed her, and she said, "Don't touch me." She then continued to walk away from the scene and Officer Pryor followed her.

In assessing whether the officers had fair notice their arrest of Ms. Cronick would be unlawful under the circumstances, "we are guided, *first*, by the text of [the ordinance] and, *then*, by any relevant state and federal decisions interpreting its import." *Holmes*, 830 F.3d at 1141 (emphasis added).

At the outset, we note that no U.S. Supreme Court or Tenth Circuit opinions address this ordinance.[4] But we have explained that in "the context [of] an alleged false arrest for a purported state offense, state law is of inevitable importance." *Kaufman*, 697 F.3d at 1300. "The basic federal constitutional right of freedom from arrest without probable cause is undoubtedly clearly established . . . [b]ut the precise scope of that right uniquely depends on the contours of a state's substantive criminal law in this case because the [officers] claim to have had probable cause based on a state criminal statute." *Id.* at 1300–01. Thus, "other than the statute itself . . . the Colorado Supreme Court is the ultimate authority." *Id.* at 1301.

[4] In *Sexton v. City of Colo. Springs*, the District of Colorado found the defendant officers had "arguable probable cause" to arrest a § 1983 plaintiff for failure to desist under Colorado Springs City Code § 9.2.103. No. 20-cv-2248-WJM-KMT, 2022 WL 168714, at *17-19 (D. Colo. Jan. 19, 2022). The officers had ordered the plaintiff, at least three times, to "stand over there" yet the plaintiff "*refused to move*, stating, 'Nah, I'm going to stand right here.'" *Id.* at *3-6 (emphasis added). Unlike the present case, the officer in *Sexton* clearly ordered the plaintiff to move, and the plaintiff physically refused to move.

But, in this case, Ms. Cronick "can carry her clearly-established-law burden by relying solely on the plain terms" of § 9.2.103. *Id.* at 1143. The ordinance requires that an 'order' be given. Although not dispositive for our purposes, at the conclusion of Ms. Cronick's bench trial in municipal court, the judge determined Officer Pryor never issued an order for her to leave the scene. And the district court determined this was a disputed fact. Because the district court determined a reasonable jury could find this fact in favor of Ms. Cronick, we must take the fact that Officer Pryor never issued an order as true for purposes of this appeal.

Even if we assume Officer Pryor *did* issue an order to disperse, Ms. Cronick complied by walking away. The text of § 9.2.103 renders unlawful the failure to obey an order, and the ordinary meaning of the ordinance does not encompass Ms. Cronick's conduct. *See* Black's Law Dictionary (4th ed. rev. 1969) (defining "obedience" as "[c]ompliance with a command . . .; the performance of what is required or enjoined by authority, or the abstaining from what is prohibited, in compliance with the command or prohibition."); Black's Law Dictionary (10th ed. 2014) (defining "disobedient" as "[n]ot observant of the commands or prohibitions of authority; deliberately not doing what one is told to do."); *id.* (defining "disobey" as "[t]o refuse to do what one is commanded to do; to disregard or ignore the authority or command.").

The officers focus on Ms. Cronick's verbal refusal to leave the scene—her reply to Officer Pryor that she did not need to leave because she lived there. Aplt. Br. 5, n.3. But, as the district court concluded, under "Colorado law and the First

Amendment, [Ms. Cronick] could not have been lawfully arrested for obstruction for her silence or for merely verbally protesting the actions of Officer Pryor." App. 300 (citing *Kaufman*, 697 F.3d at 1301). Although *Kaufman* was about a Colorado obstruction law, the principle is the same.

Similarly, in *Corona v. Aguilar*, we "concluded the officer lacked probable cause to believe [the plaintiff] had violated" a New Mexico statute for "resisting, evading, or obstructing an officer" because she "neither physically resisted the officer nor uttered any fighting words prior to her arrest." 959 F.3d 1278, 1286 (10th Cir. 2020). Ms. Cronick's 'verbal refusal' similarly did not include any fighting words to provoke or threaten the officer, and she did not physically resist his order—but instead physically complied by walking away.

We conclude the plain terms of the ordinance would have given every reasonable officer fair warning that if he or she arrested Ms. Cronick for failure to disperse, he or she would have violated Ms. Cronick's Fourth Amendment right to be free from an arrest lacking in probable cause. Ms. Cronick *physically performed* what she was asked to do. It is of no consequence she simultaneously said, "I don't need to, I live here," both because she physically complied and because this utterance was not provocative. No reasonable officer could believe Ms. Cronick disobeyed an order to disperse on the facts assumed for this appeal.

We also separately find Officer Pryor's 'order' was not given at a time when Ms. Cronick posed a substantial danger to anyone or was causing a substantial obstruction. Officer Pryor was standing in between her and the paramedics tending

to the man. Ms. Cronick refused to give her apartment number and stated, "police harassment." Officer Pryor 'ordered' her to leave after she said she did not witness anything and only called 911. The "Colorado Supreme Court had made it clear that the Colorado obstruction statute is not violated by mere verbal opposition to an officer's questioning." *Kaufman*, 697 F.3d at 1304. Accordingly, "mere remonstration does not constitute obstruction, [but] conduct constituting use or threats of physical interference or an obstacle do." *Dempsey v. People*, 117 P.3d 800, 811 (Colo. 2005). And "[s]ilence accompanied by an explanation of the basis for that silence does not obstruct anything . . . . [The officers] could have sought out other[s] . . . for questioning, and they could have even sought to compel [Ms. Cronick] to answer their inquiries with a grand jury subpoena." *Kaufman*, 697 F.3d at 1301.

We conclude clearly established law would have apprised the officers that Ms. Cronick's conduct fell outside the scope of the ordinance, such that there would not have been probable cause to arrest her for failure to desist or disperse. The officers could not have reasonably thought they were justified in arresting Ms. Cronick. We thus affirm the district court.

C. The Pat-Down Search

"The Fourth Amendment normally requires that law enforcement officers obtain a warrant, based on probable cause, before conducting a search." *See New York v. Belton*, 453 U.S. 454, 457 (1981). "There are limited exceptions to that rule, however, one of which is that officers may conduct a warrantless search of a person when it is incident to a lawful arrest of that person." *See Chimel v. California*, 395

U.S. 752, 762–63 (1969). If we conclude "there was no[] probable cause to support the warrantless arrest, the pat-down search incident to arrest was also improper." *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1256 n.7 (10th Cir. 1998). Thus, because we conclude Ms. Cronick's arrest was improper, we also conclude the officers did not have probable cause to conduct a search incident to arrest.[5]

The officers also assert they searched Ms. Cronick because they had reasonable concerns for their safety. "[W]e have only allowed an officer [to] conduct a pat-down search (or frisk) if he or she harbors an articulable and reasonable suspicion that the person is armed and dangerous." *United States v. Garcia*, 459 F.3d 1059, 1064 (10th Cir. 2006) (internal quotation marks omitted). Under the Fourth Amendment, a search for weapons is permissible "for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). But the officer must "articulate [] specific facts that led them to believe the Plaintiffs posed a threat to the officers or others." *Cortez v. McCauley*, 478 F.3d 1108, 1124 (10th Cir. 2007).

[5] Officer McCafferty emerged from the motel when he heard Ms. Cronick yelling. He did not see the exchange, and acted in reliance on what Officer Pryor told him when he conducted the pat-down search. "[A] police officer who acts in reliance on what proves to be the flawed conclusions of a fellow police officer may nonetheless be entitled to qualified immunity as long as the officer's reliance was objectively reasonable." *Baptiste*, 147 F.3d at 1260 (citations omitted). But the officers fail to brief this, so we decline to consider it. *See Craven v. Univ. of Colo. Hosp. Auth.*, 260 F.3d 1218, 1226 (10th Cir. 2001) ("We will not manufacture arguments for an appellant.").

The officers articulate no specific facts that led them to believe Ms. Cronick was a threat. Instead, they claim she was "amid a rapidly evolving medical treatment scene, only a few feet from the patient, . . . claimed knowledge, . . . and then [] refused [] [] to leave the crime scene." Aplt. Reply at 10. The officers also contend they were in "one of the busiest 911 indicators in the City of Colorado Springs, where drug use, alcohol use, and violence are prevalent." *Id.* But the Supreme Court has said "[t]he fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." *Brown v. Texas*, 443 U.S. 47, 52 (1979).

The officers fail to articulate specific facts that led them to believe Ms. Cronick posed a threat and offer nothing beyond conclusory references to safety. It is clearly established that every pat-down is unreasonable unless it is supported by the officer's reasonable suspicion that the person to be frisked is armed and dangerous. *Terry,* 392 U.S. at 27. Their presence in an area prone to "drug use, alcohol use, and violence" is insufficient. Aplt. Reply at 10.; *see, e.g.*, *Brown*, 443 U.S. at 52. Since there was no articulable reason to suspect Ms. Cronick posed a threat, we affirm the denial of qualified immunity for the officers' search of her person.

III. Conclusion

We affirm. The officers are not entitled to qualified immunity because they violated Ms. Cronick's clearly established constitutional rights.