

11-4649-cv

Ackerson v. City of White Plains, et al.

1
2 UNITED STATES COURT OF APPEALS

3
4 FOR THE SECOND CIRCUIT

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8 August Term, 2012

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10 Argued: October 29, 2012

Decided: November 29, 2012

11 Amended: December 4, 2012

12
13 Docket No. 11-4649-cv

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15
16 SHAWN ACKERSON,

17
18 *Plaintiff-Appellant,*

19
20 -v.-

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22 CITY OF WHITE PLAINS, POLICE BUREAU OF WHITE PLAINS, STEPHEN FOTTRELL,
23 INDIVIDUALLY AND IN HIS CAPACITY AS SERGEANT IN THE POLICE BUREAU OF WHITE
24 PLAINS, ERIC FISHER, INDIVIDUALLY AND IN HIS CAPACITY AS A LIEUTENANT IN
25 THE POLICE BUREAU OF WHITE PLAINS, JOHN DOE, WHOSE TRUE NAME IS NOT KNOWN
26 TO PLAINTIFF, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER IN THE POLICE
27 BUREAU OF WHITE PLAINS,

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29 *Defendants-Appellees.*

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36 Before:

37 WESLEY, CHIN, *Circuit Judges*, LARIMER, *District Judge*.*

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* The Honorable David G. Larimer, of the United States District Court for the Western District of New York, sitting by designation.

1 Appeal from a September 27, 2011 judgment of the United
2 States District Court for the Southern District of New York
3 (Duffy, J.), granting Appellees' motion for summary judgment
4 and dismissing the case in its entirety. Plaintiff-Appellant
5 was arrested for third-degree menacing under New York law
6 and brought an action against the Appellees for false
7 arrest, malicious prosecution, and violation of his
8 constitutional rights under 42 U.S.C. § 1983. Appellant
9 also sued the City of White Plains under § 1983 for failure
10 to train and supervise the arresting officers. Appellant
11 asks us to vacate the judgment, reverse the district court's
12 grant of summary judgment for Appellees on qualified
13 immunity grounds, reverse the denial of his motion for
14 partial summary judgment as to liability on his false arrest
15 claims under New York law and § 1983, and reverse the denial
16 of his motion for partial summary judgment dismissing
17 Appellees' probable cause defense. Appellant also asks us
18 to reverse the district court's grant of summary judgment
19 for the City of White Plains under § 1983. We reverse in
20 part and affirm in part.

21
22 REVERSED IN PART, AFFIRMED IN PART.
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26 David Gordon, Gordon & Haffner, LLP, Harrison, NY,
27 *for Plaintiff-Appellant.*

28
29 Frances Dapice Marinelli, Joseph A. Maria, P.C.,
30 *for Defendants-Appellees.*
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34 PER CURIAM:

35 Plaintiff-Appellant Shawn Ackerson appeals from a
36 September 27, 2011 judgment of the United States District
37 Court for the Southern District of New York (Duffy, J.),
38 granting Appellees' motion for summary judgment and
39 dismissing the case in its entirety. The panel has reviewed

1 the briefs and the record in this appeal and agrees
2 unanimously that oral argument is unnecessary because "the
3 facts and legal arguments [have been] adequately presented
4 in the briefs and record, and the decisional process would
5 not be significantly aided by oral argument." Fed. R. App.
6 P. 34 (a)(2)(C).

7 **Background**

8 On Thursday, November 8, 2007, Ackerson was arrested
9 for third-degree menacing because he approached a woman in
10 her driveway, questioned her about members of her household,
11 and insisted that her car had hit his. This "conversation"
12 ended with the woman demanding that Ackerson leave. The
13 woman then called the police. The following are the
14 relevant, undisputed facts as the officers knew them at the
15 time of the arrest.

16 Officer Cotto responded to the woman's complaint and
17 filed the following report:

18 a white male [named] Sean [sic] Ackerson
19 came to [the woman's] house . . . claiming
20 that the vehicle she was driving sideswiped
21 his earlier that day in Eastchester.
22 Ackerson told her that he got her address
23 via her license plate. [The woman] told
24 Ackerson that her husband had been . . .
25 driving her car earlier that day to a
26 contracting site in Eastchester. [The
27 woman] later found out from her husband
28 that the site he is working from is the

1 residence of Sean [sic] Ackerson's [e]x-
2 girlfriend . . . whom Ackerson has been
3 stalking. [The woman] was fearful that
4 Ackerson might harm her and she called the
5 police; Ackerson disappeared. Report was
6 referred to Lt. Fisher for follow up and
7 [the woman] will be in later to give a
8 statement.
9

10 JA 111. White Plains Lieutenant Eric Fisher became aware of
11 this incident from Eastchester Detective Anthony Mignone.
12 Mignone called Fisher to tell him that, while investigating
13 an assault involving Ackerson, he learned that Ackerson may
14 have been at a house in White Plains that day. Fisher then
15 checked the computer dispatch system and came across Cotto's
16 report. Cotto eventually spoke with Fisher and said the
17 woman

18 had pulled into her driveway in her
19 vehicle. When she was exiting her vehicle,
20 a male suspect approached her from behind,
21 ask[ed] her if she lived [t]here
22 He asked her questions about her vehicle
23 possibly sideswiping his vehicle earlier in
24 the day in Eastchester. He then approached
25 her and asked her a question about her
26 child. She said that she became nervous.
27 She didn't know who this subject was. She
28 then ran into the house shortly thereafter.
29 The subject then fled in his car.
30

31 JA 242-43.

32 Fisher called Mignone and told him there had been an
33 incident involving Ackerson in White Plains. Mignone told

1 Fisher that they planned on arresting Ackerson. Fisher then
2 spoke with the woman who confirmed everything Fisher had
3 learned up to that point.

4 Eventually, Fisher sent White Plains Sergeant Stephen
5 Fottrell to the Eastchester Police Department to interview
6 Ackerson. Ackerson apologized for scaring the woman and
7 indicated that he had suspected his ex-girlfriend was
8 cheating on him with someone who lived at the woman's
9 residence. When Fottrell asked how he learned the woman's
10 address, Ackerson became uncooperative and stopped answering
11 questions.

12 Fottrell then called Fisher, who directed him to arrest
13 Ackerson for menacing. In his deposition, Fisher stated
14 that he believed Ackerson's actions constituted third-degree
15 menacing because

16 the fact that all of the information that
17 I had developed, coupled with the fact that
18 he had obtained her address and name, drove
19 to her house, approached her in her
20 driveway, got out of the car, approached
21 her in her driveway while she was getting
22 out of the car alone and just getting out
23 of the hospital, by asking her questions
24 relative to her family and her children, by
25 approaching her in the driveway, to the
26 point where she needed to call her neighbor
27 to stand by outside with her *because of the*
28 *fear that this unknown subject put in her,*
29 I believe that constituted a menace.

30

1 JA 108(emphasis added). Fottrell also believed the conduct
2 supported an arrest for menacing because:

3
4 Mr. Ackerson approached a woman in the
5 driveway of her home, called her by name,
6 accused her of having a car accident with
7 him and leaving, started asking her
8 questions about the ages of her children.
9 And at this time, he was within two to
10 three feet of her. *Mr. Ackerson is a large*
11 *individual, which I believe placed the*
12 *complainant in fear of her safety.*
13

14 JA 127(emphasis added).

15 After arresting Ackerson, Fottrell asserted the
16 following in an accusatory instrument for third-degree
17 menacing:

18
19 **FACTS:** The defendant . . . did place [the
20 woman] in fear of physical injury by
21 following her to her residence and
22 interrogating her about ownership of her
23 vehicle. The defendant claims the victim's
24 vehicle had side swiped his earlier in the
25 day.
26

27 JA 25. Fottrell's post-arrest report does not deviate from
28 the above synopsis and adds that at one point the woman
29 asked a neighbor to stay nearby while Ackerson was in her
30 driveway.

31 Ackerson was prosecuted on the misdemeanor information
32 in White Plains City Court. Ackerson was arraigned on

1 November 9, 2007 and released on his own recognizance. The
2 court dismissed the information on January 31, 2008 on the
3 ground that it failed to make out the crime of third-degree
4 menacing.

5 Ackerson filed a complaint in the Southern District of
6 New York alleging false arrest and malicious prosecution
7 claims against Fisher and Fottrell under § 1983 and the City
8 of White Plains alleging that the White Plains Police Bureau
9 failed to train and supervise the officers under § 1983 (the
10 "*Monell* claim"). The complaint also asserted false arrest
11 and malicious prosecution claims under New York law against
12 all defendants. After cross-motions for summary judgment,
13 the district court granted summary judgment for the City on
14 the *Monell* claim, dismissed all claims against the White
15 Plains Police Bureau, and denied the motions in all other
16 respects. Ackerson then moved for reconsideration of his
17 partial summary judgment motion—conceding that there were no
18 material issues of fact. On September 22, 2011, the
19 district court concluded that the defendants were entitled
20 to qualified immunity as a matter of law and dismissed all
21 of his claims. Judgment was entered consistent with that
22 order, and Ackerson appealed.

1
2 **Discussion¹**
3

4 **I. Federal and State False Arrest Claims**
5

6 **A. Probable Cause**

7 "A § 1983 claim for false arrest . . . is
8 substantially the same as a claim for false arrest under New
9 York law." *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996)
10 (citations omitted). Under New York law, an action for
11 false arrest requires that the plaintiff show that "(1) the
12 defendant intended to confine him, (2) the plaintiff was
13 conscious of the confinement, (3) the plaintiff did not
14 consent to the confinement and (4) the confinement was not
15 otherwise privileged." *Broughton v. State of New York*, 37
16 N.Y.2d 451, 456 (1975).

17 Probable cause "is a complete defense to an action for
18 false arrest" brought under New York law or § 1983. *Weyant*,
19 101 F.3d at 852 (internal quotation marks and citation
20 omitted). "Probable cause to arrest exists when the
21 officers have . . . reasonably trustworthy information as
22 to[] facts and circumstances that are sufficient to warrant

¹ "We review de novo a district court's ruling on cross-motions for summary judgment, in each case construing the evidence in the light most favorable to the non-moving party." *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 167 (2d Cir. 2007).

1 a person of reasonable caution in the belief that an offense
2 has been . . . committed by the person to be arrested.”
3 *Zellner v. Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007). In
4 deciding whether probable cause existed for an arrest, we
5 assess “whether the facts known by the arresting officer at
6 the time of the arrest objectively provided probable cause
7 to arrest.” *Jaegly v. Couch*, 439 F.3d 149, 153 (2d Cir.
8 2006) (citing *Devenpeck v. Alford*, 543 U.S. 146, 153
9 (2004)). Whether probable cause existed for the charge
10 “actually invoked by the arresting officer at the time of
11 the arrest” is irrelevant. *Id.* at 154. “Accordingly,
12 Defendants prevail if there was probable cause to arrest
13 Plaintiff[] for any single offense.” *Marcavage v. City of*
14 *New York*, 689 F.3d 98, 109-10 (2d Cir. 2012). The same is
15 true under New York law: probable cause “does not require an
16 awareness of a particular crime, but only that some crime
17 may have been committed.” *Wallace v. City of Albany*, 283
18 A.D.2d 872, 873 (3d Dep’t 2001).

19 Appellees have not provided us with a theory of
20 criminal liability, other than third-degree menacing, for
21 which probable cause might have existed to arrest Ackerson.
22 See e.g., *Holley v. County of Orange*, 625 F. Supp. 2d 131,
23 139 (S.D.N.Y. 2009). We therefore limit our discussion to

1 whether defendants had probable cause to arrest Ackerson for
2 third-degree menacing.

3 **B. Third-Degree Menacing**

4 In New York, “[a] person is guilty of menacing in the
5 third degree when, by **physical menace**, he or she
6 intentionally places or attempts to place another person in
7 fear of death, imminent serious physical injury or physical
8 injury.” N.Y. Penal Law § 120.15 (emphasis added). The
9 defendant must take a **physical** action with the **intent** to
10 make another reasonably afraid of an “**imminent** danger; that
11 is, the perceived danger must be immediate.” *Holley*, 625 F.
12 Supp. 2d at 138 (emphasis added) (citations omitted); see
13 William C. Donnino, *Practice Commentary, McKinney’s*
14 *Consolidated Laws of New York*, Penal Law § 120.15.

15 Oral statements alone do not constitute a physical
16 menace and must be accompanied by a physical action beyond
17 approaching someone to talk with them. See *People v.*
18 *Whidbee*, 803 N.Y.S.2d 20 (N.Y. Kings Cty. Crim. Ct. 2005).
19 In *Whidbee*, the court noted that “the only pertinent
20 allegations . . . are that the defendant approached the
21 complainant, questioned her about her current relationship
22 status, followed her and told her that if she called the

1 police again she had better watch her back and her
2 children's back." *Id.* Those actions were insufficient to
3 sustain a menacing charge because "the only physical act
4 alleged . . . [was] that the defendant followed the
5 complainant." *Id.* Moreover, third-degree menacing requires
6 a well-founded fear of imminent physical injury. When a
7 complainant fails to testify to actually being in fear of
8 injury, the evidence is insufficient to sustain a menacing
9 conviction. *See People v. Peterkin*, 245 A.D.2d 1050, 1051
10 (4th Dep't 1997).

11 Here, there was no probable cause for the third-degree
12 menacing arrest by Fisher and Fottrell. Ackerson approached
13 the woman, came within a few feet of her in her driveway,
14 asked her questions, and left. Before deciding to have
15 Ackerson arrested, Fisher had the benefit of Cotto's report,
16 a conversation with Cotto, and a conversation with the
17 complainant. Other than general statements as to not
18 knowing "what, if anything, [Ackerson] was capable of," the
19 woman never stated that she felt physically threatened or
20 that Ackerson took any assaultive actions. The accusatory
21 instrument also did not contain any accusations amounting to
22 a **physical menace**, noting only that Ackerson followed "her
23 to her residence" and interrogated her "about ownership of

1 her vehicle."² JA 25. Ackerson's alleged conduct did not
2 even rise to the level of a verbal threat, must less a
3 physical act that would reasonably have placed the
4 complainant in fear of imminent physical injury. Thus, the
5 district court should have granted Ackerson's motion for
6 partial summary judgment on Appellees' probable cause
7 affirmative defense.

8
9
10 **II. Qualified Immunity**

11
12 Qualified immunity is a complete defense to false
13 arrest claims. An arresting officer is entitled to
14 qualified immunity even when, as in this case, probable
15 cause to arrest does not exist, "if he can establish that
16 there was 'arguable probable cause' to arrest." *Escalera v.*
17 *Lunn*, 361 F.3d 737, 743 (2d Cir. 2004).

18 "Arguable probable cause exists if either (a) it was
19 objectively reasonable for the officer to believe that
20 probable cause existed, or (b) officers of reasonable
21 competence could disagree on whether the probable cause test
22 was met." *Id.* (internal quotation marks omitted). In this

²The accusatory instrument itself is insufficient on its face; Fottrell failed to provide reasonable cause to believe that the defendant committed the offense charged. See N.Y. Crim. Proc. L. §§ 100.40(1)(b), (4)(b).

1 respect, the qualified immunity test "is more favorable to
2 the officers than the one for probable cause." *Id.* The
3 test is not toothless, however: "If officers of reasonable
4 competence would have to agree that the information
5 possessed by the officer at the time of arrest did not add
6 up to probable cause, the fact that it came close does not
7 immunize the officer." *Jenkins v. City of New York*, 478
8 F.3d 76, 87 (2d Cir. 2007).

9 Here, after noting that third-degree menacing
10 "generally involve[s] more direct threats of physical harm
11 than the present case," the district court proceeded to
12 grant summary judgment for defendants on the theory that
13 Fisher and Fottrell were entitled to qualified immunity.
14 *Ackerson v. City of White Plains*, No. 08 Civ. 9549 (KTD),
15 2011 U.S. Dist. LEXIS 107383, at *4 (S.D.N.Y. Sept. 20,
16 2011). The district court excused the arrest because

17
18 Ackerson, a large man, approached [the
19 woman] at her home, placed himself within
20 a few feet of her, and asked questions
21 about her children, an arresting officer
22 could reasonably conclude that Ackerson's
23 approaching [the woman] was an action that
24 made [her] fear for her physical well-
25 being. Similarly, based on [the woman's]
26 statement that she became "nervous," felt
27 need to yell to a neighbor that she might
28 need him to call the police, assumed
29 Ackerson was stalking his ex-girlfriend and

1 "became very afraid suspecting that this
2 person was capable of anything," one could
3 reasonably conclude that she had a fear of
4 imminent harm."
5

6 *Id.* at *4-5.
7

8 The district court's analysis elides the key legal
9 requirement for a third-degree menacing charge: A **physical**
10 **menace**. Police officers of reasonable competence could not
11 disagree over whether probable cause existed without that
12 crucial element.³ Being tall, approaching someone, and
13 asking them questions (even in an accusatory tone) does not
14 arguably satisfy the elements of any crime.

15 We conclude that the district court erred in granting
16 summary judgment for the defendants and dismissing the
17 entire action on a theory of qualified immunity. Having
18 decided that neither probable cause nor arguable probable
19 cause existed for the arrest as a matter of law, we also
20 conclude that the district court erred in denying Ackerson's
21 motion for partial summary judgment as to liability on his
22 false arrest claims against Fisher and Fottrell. Defendants
23 concede that there are no material disputed facts, and they

³ In fact, the Assistant Chief of Police for the White Plains Police Department stated in her deposition that she could "see how [the event] was very frightening, but there is nothing there about him taking a physical action in any way that may have caused the fear." JA 289.

1 have not argued that they had probable cause to arrest
2 Ackerson for any other crime. Moreover, because Ackerson's
3 state law false arrest claim creates liability for the City
4 of White Plains, under a theory of *respondeat superior*,
5 Ackerson is also entitled to partial summary judgment as to
6 that defendant. See *Raysor v. Port Auth. of N.Y. & N.J.*,
7 768 F.2d 34, 40 (2d Cir. 1985); *Williams v. City of White*
8 *Plains*, 718 F. Supp. 2d 374, 381 (S.D.N.Y. 2010).

9 Lastly, we affirm the district court's grant of summary
10 judgment on the *Monell* claim, as well as the dismissal of
11 the malicious prosecution claims. Ackerson appealed the
12 *Monell* claim but only made passing references to it in his
13 opening brief. Moreover, Ackerson has not contested the
14 dismissal of his malicious prosecution claim under either
15 New York Law or § 1983. See *Tolbert v. Queens College*, 242
16 F.3d 58, 76 (2d Cir. 2001); see also *Frank v. United States*,
17 78 F.3d 815, 833 (2d Cir. 1996), *vacated on other grounds*
18 *by*, 521 U.S. 1114 (1997).

19
20 **Conclusion**
21

22 For the foregoing reasons, the judgment of the district
23 court is **VACATED**. The order of the district court granting
24 summary judgment to all defendants on the theory that Fisher

1 and Fottrell were entitled to qualified immunity is hereby
2 **REVERSED**; denying partial summary judgment on Ackerson's
3 state law false arrest claims against Fisher, Fottrell, and
4 the City of White Plains is **REVERSED**; and denying partial
5 summary judgment for Ackerson against Fisher and Fottrell
6 under § 1983 for false arrest is **REVERSED**. We **AFFIRM** the
7 district court's grant of summary judgment for Defendants-
8 Appellees on the *Moneil* claim and the dismissal of all
9 malicious prosecution claims under New York law and § 1983.
10 The case is **REMANDED** with instructions to grant Ackerson's
11 motion for partial summary judgment on liability for his
12 state law false arrest claims against Fisher, Fottrell, and
13 the City of White Plains; against Fisher and Fottrell under
14 § 1983 for his false arrest claims; and for the dismissal of
15 the affirmative defenses of probable cause.

16