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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Basilea Mena,

10 Plaintiff,

11 v.

12 Robert Massie,

13 Defendant.
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No. CV-17-00368-TUC-DCB

ORDER

15 For the reasons explained below, the Court grants in part and denies in part the
16 Defendants' Motion for Summary Judgment.

17 The Court grants summary judgment to the extent the Plaintiff alleges an illegal
18 seizure or false arrest. The Court denies summary judgment on Plaintiff's claim of
19 excessive use of force.

20 Neither party seeks oral argument on the motion. The parties submitted memoranda
21 thoroughly discussing the law and evidence in support of their positions, and oral argument
22 will not aid the court's decision-making process which is entirely based on questions of
23 law. *See Mahon v. Credit Bur. of Placer County, Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999)
24 (explaining that if the parties provided the district court with complete memoranda of the
25 law and evidence in support of their positions, ordinarily oral argument would not be
26 required). The Court rules without hearing arguments.
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1 Plaintiff alleges that Defendants violated the Fourth Amendment which prohibits
2 unreasonable searches and seizures when she refused to produce her identification.

3 Defendants arrested her for violating A.R.S. § 13-2412(A) which provides:

4 It is unlawful for a person, after being advised that the person's refusal to answer is
5 unlawful, to fail or refuse to state the person's true full name on request of a peace
6 officer who has lawfully detained the person based on reasonable suspicion that
7 the person has committed, is committing or is about to commit a crime. A person
8 detained under this section shall state the person's true full name but shall not be
9 compelled to answer any other inquiry of a peace officer.

10 Failure to comply with this statute is a class two misdemeanor and probable cause
11 for arrest. A.R.S. § 13-2412(B). *See also State v. Fittz*, 2018 WL 3730953, at *2 (Ariz.
12 Ct. App. July 26, 2018).

13 The Court turns to the Defendants' assertion of qualified immunity, which protects
14 police officers from individual liability under 42 U.S.C. § 1983 for an abuse of discretion
15 violating civil rights unless the legal right was "clearly established" at the time, and a
16 reasonable person in the same position would have known that what he did violated that
17 right. *Behrens v. Pelletier*, 516 U.S. 299, 304 (1996); *Collins v. Jordan*, 110 F.3d 1363,
18 1369 (9th Cir. 1996); *Trevino v. Gates*, 99 F.3d 911, 916 (9th Cir. 1996); *Act*
19 *Up/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). Qualified immunity is
20 designed to protect an officer who, reasonably, but mistakenly, acts in violation of some
21 constitutional right. *Saucier v. Katz*, 533 U.S. 194, 205 (2001). The doctrine bars the
22 suit; it is not a defense to liability. *Act Up/Portland*, 988 F.2d at 872-73. Qualified
23 immunity is "an entitlement not to stand trial or face the other burdens of litigation."
24 *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity is a legal question,
25 and it is addressed by the Court at the earliest possible point in the litigation. *Act*
26 *Up/Portland*, 988 F.2d at 872-73.

27 When determining whether an officer is entitled to qualified immunity, the Court
28 considers (1) whether there has been a violation of a constitutional right, and (2) whether
that right was clearly established at the time of the officer's alleged misconduct. *Lal v.*
California, 746 F.3d 1112, 1116 (9th Cir. 2014). At summary judgment, an officer may
be denied qualified immunity in a Section 1983 action "only if (1) the facts alleged, taken

1 in the light most favorable to the party asserting injury, show that the officer's conduct
2 violated a constitutional right, and (2) the right at issue was clearly established at the time
3 of the incident such that a reasonable officer would have understood [his] conduct to be
4 unlawful in that situation.” *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir.
5 2011).

6 If the question of whether there has been a constitutional violation involves
7 disputed facts which, when viewed most favorably to the Plaintiff, could support a
8 rational jury finding in her favor, this Court must move to the second question: whether
9 the right at issue was clearly established such that a reasonable officer would have
10 understood his actions were unlawful. Then, the law does not “require a case directly on
11 point, but existing precedent must have placed the ... constitutional question beyond
12 debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 740 (2011). There must be precedent
13 involving similar facts to provide an officer notice that a specific use of force is unlawful.
14 *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (*per curium*).

15 The Court turns to the facts of the case as alleged by the Plaintiff. She submits
16 that she and her boyfriend had left a bar where they had played pool and drank two small
17 pitchers of beer. It was around midnight and they were walking along Speedway. They
18 were “speaking in raised voices,” i.e., arguing about whether she was cheating on him.
19 They crossed the street at the Swan intersection and at the median, her boyfriend stopped
20 on the center median. It is undisputed that police officers, Defendants Pettey and Massie,
21 heard them from where the officers were parked in a Chase Bank parking lot on Swan
22 and Speedway. Defendants Pettey and Massie drove, with their emergency lights on, to
23 the intersection to investigate what was going on. According to the Plaintiff, her
24 boyfriend was crying, and he told police that she was cheating on him. According to the
25 Plaintiff, the Defendants asked her for her identification and DID NOT ask her for her
26 name. (Ps’ SOF (Doc. 31) ¶¶2,4-11, 14-23)

27 According to the Plaintiff when the Defendants asked her to produce her
28 identification, she started to open her wallet and asked, “what we did wrong,” and they

1 wouldn't answer her, which caused her to stop getting her identification from her wallet.
2 (Ds' SOF, Ex. Mena Depo. at 25 (Doc. 29-2 at 11)). According to her, very quickly, 3
3 minutes or less, without any warning that they were going to arrest her, the male officer,
4 Defendant Massie grabbed her and jerked her around to handcuff her. *Id.* at 26-27.
5 According to the Plaintiff, as she was jerked around the handcuffs must have pinched the
6 officer's hand¹ and he shoved her against a palm tree. *Id.* at 27. Her face and shoulders
7 were severely scratched. *Id.* at 44-45.

8 It is undisputed that she was arrested, pursuant to a citation for violating A.R.S. §
9 13-2412(A), which makes it a crime to refuse to give a person's true full name upon a
10 request from a peace officer while being lawfully detained based on reasonable suspicion
11 that a crime has been, is being, or about to be committed. She submits she was not
12 advised that her refusal to give her full true name was unlawful. Failure to comply with
13 this statute is probable cause for arrest.

14 Based on the facts as alleged by the Plaintiff, the Court finds that Plaintiff's
15 constitutional rights were not violated when Officer Robert Massie and Police Sergeant
16 Pettey drove from the Chase Bank parking lot and approached her and her boyfriend
17 because they were arguing with raised voices in the median of the street. Police may
18 approach and ask questions without violating the Fourth Amendment, "[a]s long as the
19 person to whom questions are put remains free to disregard the questions and walk away,
20 there has been no intrusion upon that person's liberty or privacy as would under the
21 Constitution require some particularized and objective justification." *United States v.*
22 *Mendenhall*, 446 U.S. 544, 554 (1980). Defendants correctly assert that police officers
23 may briefly detain an individual if there is reasonable suspicion that criminal activity may
24 be afoot. *Terry v. Ohio*, 392 U.S. 1 (1968), *see also United States v. Cortez*, 449 U.S., at
25 417 (1981) ("An investigatory stop must be justified by some objective manifestation that

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27 ¹ According to Defendant Massie, she was defensively resisting arrest by twisting her arms,
28 meaning she was trying to keep from getting arrested but was not assaulting him. As she
twisted her arm, the handcuff bound up and pinched his hand and as she tried to pull away,
she came into contact with the palm tree. (Ds' SOF, Ex. Massie Depo. at 21 (Doc. 29-3 at
12)).

1 the person stopped is, or is about to be, engaged in criminal activity”). Reasonable
2 suspicion determinations must consider the “totality of the circumstances” of each case to
3 see whether a police officer has a “particularized and objective basis” for suspecting
4 wrongdoing. The Court finds that there was reasonable suspicion to detain the Plaintiff
5 under *Terry* to investigate the cause of the disturbance occurring in the middle of the
6 street, including whether it involved illegal underage consumption of alcohol, domestic
7 violence, or some public safety issue.

8 Plaintiff by her own testimony reflects she believed she was free to walk away
9 until she was not. She was surprised when without any warning Defendant Massie
10 grabbed her wrist and jerked her around to handcuff her. The issue here is whether
11 Defendant Massie had reasonable suspicion when he handcuffed and subsequently
12 arrested the Plaintiff for violating A.R.S. § 13-2412(A). According to the facts as stated
13 by the Plaintiff, he did not. He did not ask her to state her true name. He did not warn
14 her that failure to give her full true name would result in her arrest. He had neither a
15 reasonable suspicion nor probable cause to believe she was violating A.R.S. § 13-
16 2412(A).

17 The Court finds that this is the exact type of mistake that qualified immunity
18 guards against. There is no allegation by the Plaintiff that Defendant Massie
19 intentionally disregarded the statute. Either he did ask her for her full true name or as she
20 alleges he didn’t because he reasonably, but mistakenly believed the statute reached her
21 conduct of refusing to produce identification. The Court grants summary judgment for
22 Defendants on any claims of illegal seizure or false arrest.

23 The harder question is whether Defendant Massie, six feet two inches and
24 weighing 225 pounds, used excessive force when arresting the five feet five inches tall
25 and 120 pound Plaintiff, by shoving or pushing her face first into the palm tree.
26 According to her, she was jerked around and not resisting arrest. According to him, she
27 was trying to keep from getting arrested by twisting her arms and pulling away, which
28 caused her to come into contact with the palm tree. The Court finds there are material

1 questions of fact in dispute that preclude summary judgment on the basis of qualified
2 immunity.

3 The Supreme Court recently considered this Circuit’s application of qualified
4 immunity in the context of excessive use of force cases. It explained the following:

5 Use of excessive force is an area of the law ‘in which the
6 result depends very much on the facts of each case,’ and thus
7 police officers are entitled to qualified immunity unless
8 existing precedent “squarely governs” the specific facts at
9 issue. *Id.* at 309[²] Precedent involving similar facts can help
10 move a case beyond the otherwise “hazy border between
11 excessive and acceptable force” and thereby provide an
12 officer notice that a specific use of force is unlawful. *Id.*

13 *Kisela*, 138 S. Ct. at 1153.

14 Here, the underlying facts are disputed. Did the Plaintiff resist arrest? Did she jerk
15 away or did Defendant Massie jerk her about? Was she inebriated and a danger to herself
16 and/or others if not quickly subdued. Could Defendants have simply asked her to turn
17 around and put her hands behind her back? These disputed facts must be determined to
18 assess whether Defendant Massie violated the Plaintiff’s constitutional right to be free from
19 the excessive use of force. Also, these facts must necessarily be established before the
20 Court can consider the second prong of the qualified immunity assessment: whether
21 precedent exists “squarely governing” the specific facts of the case, which will move the
22 case beyond the “hazy border” between excessive and acceptable force.

23 If pressed to determine qualified immunity, now, based on the facts as alleged by
24 Plaintiff and construed in her favor, the Court would look to cases which are black and
25 white, regardless of differing factual predicts, where any force used is constitutionally
26 unreasonable, if there is no need for any use of force. *See e.g., P.B. v. Koch*, 96 F.3d 1298,
27 1303–04 & n. 4 (9th Cir.1996) (where there was no need for force, slapping, punching, and
28 choking a student bears no reasonable relation to need and can only be found to have been
done for the purpose of causing harm); *Felix v. McCarthy*, 939 F.2d 699, (9th Cir. 1991)
(denying qualified immunity were guard’s unprovoked attack against prisoner causes
bruising, soreness, and emotional damage); *Meredith v. Arizona*, 523 F.2d 481, 482-84 (9th

²” *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (*per curiam*).

1 Cir.1975) (inmate states a claim when he alleges that guards used official force for
2 unjustified purposes).

3 Ordinarily this Court would resolve qualified immunity before trial, *see Hunter v.*
4 *Bryant*, 112 S.Ct. 534, 536-37 (1991), but here the underlying facts are in dispute, and
5 therefore, the Court will not resolve the issue of qualified immunity on summary
6 judgment. *See Act Up!/Portland*, 988 F.2d at 873 (“[i]f a genuine issue of fact exists
7 preventing a determination [of qualified immunity] at summary judgment, the court may
8 permit the case to proceed to trial and make the qualified immunity determination after
9 the facts have been fully aired in the courtroom”).

10 **Accordingly,**

11 **IT IS ORDERED** that the Defendants’ Motion for Summary Judgment (Doc. 28)
12 is GRANTED IN PART AND DENIED IN PART.

13 **IT IS FURTHER ORDERED** that the Plaintiff’s excessive use of force claim
14 shall proceed to trial.

15 **IT IS FURTHER ORDERED** that within 30 days of the filing date of this Order
16 the parties shall prepare and file the Proposed Pretrial Order. A Pretrial Conference shall
17 be held thereafter, with the trial date to be set at the Pretrial Conference.

18 Dated this 7th day of January, 2019.

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Honorable David C. Bury
United States District Judge