In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00587-CV

BRANDON ROGERS, Appellant

V.

SUE OWINGS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 09-04-03802 CV

MEMORANDUM OPINION

Sue Owings sued Brandon Rogers for federal and state causes of action, including false arrest, excessive force, malicious prosecution, false imprisonment, and assault and battery.[1] Rogers filed a motion for traditional and no-evidence summary judgment on grounds of qualified and official immunity. The trial court denied Rogers's motion. In this interlocutory appeal, Rogers challenges the denial of his summary judgment motion.

[1] Owings also sued Montgomery County, but the County is not a party to this appeal.

See Tex. Civ. Prac. & Rem. Code § 51.014(a)(5) (West 2008). We reverse the trial court's order denying Rogers's motion for summary judgment and render judgment dismissing Owings's claims against Rogers.

Background

Owings and her infant grandchild arrived at a psychiatrist's office for an appointment. The staff had no record of Owings's appointment. Owings became upset. The staff asked Owings to leave, but Owings stayed "[j]ust a few minutes." When Julie Brown, the office manager, threatened to call the police, Owings said, "Call them."

Brown called 911. Brown told the 911 operator that an "irate" female patient was refusing to leave the waiting room. Brown identified Owings and described Owings as "very threatening." Brown stated that she asked Owings to leave, but Owings refused and told Brown to call the police. Brown stated that other patients were "pretty riled up" and ready to "lynch" Owings, Owings was prohibiting patients from checking in or out, patients were upset with Owings, and the staff could not help other patients because of the disturbance. The 911 operator heard arguing in the background of the call. Brown told the operator that Owings wore a yellow shirt and had a baby with her. Owings left the office during the 911 call.

Rogers, a sheriff's deputy, was dispatched to the scene. He and Owings met in the elevator area on the second floor of the building in which the psychiatrist's office is located.

According to Rogers, Owings tried to enter the elevator and "pushed" into him. She gave Rogers a "cross and angry look." Rogers asked her to "step back," but Owings refused. After several requests, Owings finally stepped back and Rogers told her to put the baby down. Owings again refused, but when she finally handed the baby to someone else, she refused Rogers's requests to put her hands behind her back. Rogers grabbed Owings's right wrist and pulled it behind her back. Owings pulled away and pushed Rogers. Rogers ordered Owings to "stop resisting." Rogers pushed Owings against the wall for leverage, but denied slamming Owings against the wall. Owings pushed away from the wall. Rogers held Owings's right arm and forcefully pushed Owings into the wall to maintain physical control over Owings. Rogers denied raising Owings's arms above her head or grabbing Owings's arms and forcing them together. When Owings stopped using physical force, Rogers handcuffed Owings. He used two sets of handcuffs because Owings "stated she had a sore rotator cuff in her shoulder."

According to Owings, Rogers told her to put the baby down, but Owings froze because she was afraid of being tasered, even though she did not know whether Rogers had a taser. After two requests from Rogers, Owings handed the baby to another person. Owings stated that Rogers grabbed her arm, mashed an object against her hand, turned her hand upside down, "rammed" her against the wall, placed his knee between her legs, twisted her arm over her head, and told Owings to stop resisting. Owings told Rogers, "[Y]ou're killing me. I'm not resisting. You're hurting me." Rogers grabbed Owings's

other arm, twisted her arm around, pressed her arms together, and told her to put her arms behind her back. Owings told Rogers that her arms "don't go like that." She stated that Rogers took her straight arms, curled them under, and bent them to apply handcuffs. Owings stated that Rogers was "inflicting as much pain as he could." Owings stated that her daughter-in-law later arrived and told Rogers that Owings was in pain and had previously undergone shoulder surgery, but Rogers refused to loosen the handcuffs. Owings spent the night in jail, but no charges were pursued against her.

Owings stated that, the day after her arrest, she visited the emergency room for pain in both shoulders. Before the arrest, Owings had surgery on her right shoulder for a torn rotator cuff that she received when an officer twisted her arm behind her back during an arrest. After the arrest, Owings had surgery on her left shoulder for a torn rotator cuff that Owings believed resulted from the arrest by Rogers.

Approximately six days after Owings's arrest, Dr. Eric Price saw Owings to address her complaints about right shoulder pain. Price found that Owings had less range of motion in her right shoulder and normal range of motion in her left shoulder. Price diagnosed Owings with "[p]ossible retear of her rotator cuff" and stated that, based on a reasonable medical probability and an assumption that Rogers wrenched Owings's arm back, Owings suffered at least a shoulder sprain from the arrest.

Approximately three months after her arrest, Dr. Dalton Heath diagnosed Owings with a left shoulder injury and performed surgery on Owings's left shoulder. Heath

testified that "trauma may have produced enough inflammation that [the arrest] began to precipitate the impingement that ultimately [Owings] had[,]" but Heath could not tell whether Owings's injury resulted from a one-time event or overuse. Based on the assumption that Owings had no prior pain, Heath suspected that, more likely than not, Owings's injury resulted from the arrest.

In his deposition, Rogers testified that he had probable cause to believe that Owings committed criminal trespass and disorderly conduct. He testified, "I don't believe that I used any force against [Owings] that would have caused an injury." In his affidavit, Rogers explained:

> At the time I arrested Ms. Owings, I knew she had just left the doctor's office where reportedly she had been irate and had caused a serious disturbance to a waiting room full of other patients. I had no way of knowing at that time that she was not potentially violent. The fact that she was holding a baby when I first encountered her added to the potential urgency of the situation, since the baby's safety was also a concern to me. Ms. Owings had a very agitated look in her eyes, which is consistent with the reports that she had seemed threatening to the office manager. Also, I had no way of knowing, from any objective indicia, that Ms. Owings had a physical problem with her shoulder or shoulders that made her any more susceptible than the average person to an injury from being handcuffed behind the back.

In an affidavit, Lieutenant Jon Buckholtz opined that, taking Owings's statements as true, "a reasonable law enforcement officer in the position of Deputy Rogers could have believed his arrest of Ms. Owings was valid, supported by probable cause, and authorized by law." Buckholtz explained that "[b]ased on the 911 dispatch, [Rogers] was aware that an eyewitness-complainant (the office manager) had reported a trespass and

angry disturbance in that office suite, and thus, a reasonable officer in Deputy Rogers'[s] position had reason to connect the crime with the place of the arrest." Buckholtz stated, "[A] reasonable officer in Rogers'[s] position could have believed that the circumstances reported to him reasonably showed that Ms. Owings . . . had committed a breach of the peace. Such reasonable officer could have concluded that Ms. Owings had criminally trespassed in the doctor's waiting room. As reported by the office manager – a person with apparent authority over the premises – Ms. Owings had refused to leave the premises." He stated that "a reasonable officer exiting the elevator and there confronting Ms. Owings could have concluded that the suspect's reportedly threatening, obstreperous behavior in the doctor's office justified an immediate arrest." Buckholtz explained that "[a]rresting Ms. Owings immediately would neutralize the risk that she, in her apparently agitated state, would return to the psychiatrist's office to provoke further disturbance with the doctor's staff and with his patients." He further concluded that "a reasonable law enforcement officer in the position of Deputy Rogers could have believed that the use of force employed to arrest Ms. Owings was reasonable and not excessive." Buckholtz explained:

> The disturbance in the doctor's office and the resulting 911 call had occurred less than five minutes prior to the encounter between the officer and Ms. Owings. Ms. Owings testified that [she] froze when she saw the officer. It was thus reasonable for an officer in Deputy Roger's [sic] position to assume that Ms. Owings knew that he had been dispatched to the scene because of the disturbance she had just caused.

Buckholtz noted that, during her deposition, Owings used a police training dummy to demonstrate that "Rogers held her arms back at an approximately ninety[-]degree angle in relation to the line of her spine at her shoulders." Buckholtz stated that Owings's demonstration showed that she "[kept] her arms straight behind her, rather than bending them at the elbow to facilitate the officer's attempt to bring her hands together behind her and place them in the handcuffs[,]" and Rogers "held [Owings's] palms out, which would have allowed her to bend her arms at the elbow." Based on this information, Buckholtz stated that "only [Owings's] own resistance would have prevented her elbows from bending naturally." Buckholtz stated, "Deputy Rogers'[s] technique in bending [Owings's] arms back to apply handcuffs is well within the range of reasonable force under these circumstances[,]" particularly given that Rogers applied two sets of handcuffs to reduce the pressure on Owings's shoulders. He explained that "a reasonable officer could believe that merely inflicting bruises to a suspect's wrists by means of applying handcuffs too tightly, is not excessive force."

In her petition, Owings asserted a claim pursuant to 42 U.S.C. § 1983 on grounds that Rogers's actions "constitute unreasonable searches and seizures, excessive force, abuse of power, malicious prosecution, and deprived plaintiff of her federal Constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution." She further asserted the State law claims of false imprisonment and assault and battery.

Standard of Review

We review a trial court's ruling on a traditional summary judgment motion *de novo*. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We "must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented." *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). We "consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts against the motion." *Id.* at 756.

"A no-evidence summary judgment motion . . . is essentially a motion for a pretrial directed verdict; it requires the nonmoving party to present evidence raising a genuine issue of material fact supporting each element contested in the motion." *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). "[W]e 'review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.'" *Id*. (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)).

Qualified Immunity

In issues one, two, and three, Rogers contends that qualified immunity bars Owings's false arrest, excessive force, and malicious prosecution claims brought pursuant to 42 U.S.C. § 1983.

"Section 1983 provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States[.]" *Livadas v. Bradshaw*, 512 U.S. 107, 132, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994); *see* 42 U.S.C.A. § 1983 (2003). "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "To establish an entitlement to qualified immunity, a government official must first show that the conduct occurred while he was acting in his official capacity and within the scope of his discretionary authority." *Beltran v. City of El Paso*, 367 F.3d 299, 303 (5th Cir. 2004). "Once a defendant has properly invoked qualified immunity, the burden rests on the plaintiff to show that the defense does not apply." *Id*.

In this case, the parties do not dispute that Rogers acted in his official capacity and within the scope of his discretionary authority when arresting Owings. Thus, to determine whether qualified immunity applies, we consider whether: (1) Owings "alleged a violation of a clearly established federal constitutional or statutory right[;]" and (2) Rogers's "conduct was objectively reasonable in light of the clearly established legal rules at the time of the alleged violation." *Id*. "We must accept all well-pleaded facts as true, draw all inferences in favor of the nonmoving party, and view all facts and

inferences in the light most favorable to the nonmoving party." *Club Retro, LLC v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009).

False Arrest

In issue one, Rogers contends that qualified immunity bars Owings's claim for false arrest because he had probable cause to arrest Owings for criminal trespass, disorderly conduct, or both.

"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). "The constitutional claim of false arrest requires a showing of no probable cause." *Hilton*, 568 F.3d at 204. "[P]ost-hoc justifications based on facts later learned cannot support an earlier arrest." *Id.* "The facts must be particularized to the arrestee." *Id.* "We apply an objective standard, which means that we will find that probable cause existed if the officer was aware of facts justifying a reasonable belief that an offense was being committed, whether or not the officer charged the arrestee with that specific offense." *Id.* "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)). "[A] qualified immunity defense cannot succeed where it is obvious that a reasonably competent officer would find no probable cause[,]" but "'if officers of reasonable competence could disagree on this issue, immunity should be recognized.'"

Id. (quoting *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994)). "[R]egardless of whether the officer had authority under state law to make the arrest, the arrest is valid under constitutional principles so long as the officer had probable cause to arrest."[2] *Brown v. Town of DeKalb, Miss.*, 519 F.Supp.2d 635, 641 (S.D. Miss. 2007); *see Fields v. City of South Houston, Tex.*, 922 F.2d 1183, 1189 (5th Cir. 1991).

To determine whether Rogers had probable cause to arrest Owings, we first identify the facts available to Rogers at the time of Owings's arrest. In doing so, we look to the collective knowledge of Rogers and the 911 operator. *See Evett v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 330 F.3d 681, 688 (5th Cir. 2003) ("[P]robable cause may be supported by the collective knowledge of law enforcement personnel who communicate with each other prior to the arrest."); *see also Derichsweiler v. State*, No. PD-0176-10, 2011 Tex. Crim. App. LEXIS 112, at **16-17 (Tex. Crim. App. Jan. 26, 2011) (not yet released for publication) ("A 911 police dispatcher is ordinarily regarded as a 'cooperating officer[.]'"). The facts available to Rogers at the time of Owings's

[2] According to Owings, Rogers could not effectuate a warrantless arrest for criminal trespass. *See Heath v. Boyd*, 141 Tex. 569, 175 S.W.2d 214, 216-17 (1943). Owings contends, "When arrest is made under a state, rather than a federal, statute, the requisite standard of probable cause for a lawful arrest is determined by state law, provided such law meets federal constitutional standards." The cases cited by Owings do not address a section 1983 action. *See U.S. v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); *see also U.S. v. Romano*, 482 F.2d 1183, 1189 (5th Cir. 1973); *Nicholson v. U.S.*, 355 F.2d 80, 83 (5th Cir. 1966); *Hart v. U.S.*, 316 F.2d 916, 919 (5th Cir. 1963). For purposes of section 1983, whether an officer had probable cause to arrest is the proper inquiry. *See Brown v. Town of DeKalb, Miss.*, 519 F.Supp.2d 635, 641 (S.D. Miss. 2007); *see also Fields v. City of South Houston, Tex.*, 922 F.2d 1183, 1189 (5th Cir. 1991).

arrest include the following: (1) an "irate" female patient, identified as Owings, refused to leave the waiting room; (2) Owings was "very threatening[;]" (3) Brown, the office manager, asked Owings to leave, but Owings refused; (4) Owings told Brown to call the police; (5) other patients were upset, "riled up," and ready to "lynch" Owings; (6) Owings was prohibiting other patients from checking in or out; (7) office staff could not help other patients because of the disturbance; (8) the 911 operator heard arguing voices; (9) Owings was demanding to see the doctor; (10) Owings wore a yellow shirt and had a baby with her; and (11) Owings left the office during the 911 call.

A person commits criminal trespass "if the person enters or remains on or in property of another, including . . . a building . . . without effective consent and the person: (1) had notice that the entry was forbidden; or (2) received notice to depart but failed to do so."[3] Tex. Penal Code Ann. § 30.05(a) (West Supp. 2010). "'Notice' means . . . oral or written communication by the owner or someone with apparent authority to act for the owner[.]" *Id*. at § 30.05(b)(2)(A) (West Supp. 2010).

Owings contends that Rogers lacked probable cause to arrest her for criminal trespass because Rogers had no knowledge that a crime had been committed, a person with apparent authority had given Owings notice to depart from the office, and Owings had failed to depart the office. "[O]wnership is not an element of the offense of criminal trespass." *Langston v. State*, 855 S.W.2d 718, 721 (Tex. Crim. App. 1993).

[3] Because the amended version of section 30.05(a) contains no material changes applicable to this case, we cite to the current version of the statute. *See* Tex. Penal Code Ann. § 30.05(a) (West Supp. 2010).

Nevertheless, the Penal Code defines an "owner," in pertinent part, as one who has "a greater right to possession of the property than the actor[.]" Tex. Penal Code Ann. § 1.07(a)(35)(A) (West Supp. 2010). "'Possession' means actual care, custody, control, or management.'" *Id*. at § 1.07(a)(39) (West Supp. 2010). Brown, as office manager, had a greater right than Owings to possession of the premises. *See id*. at § 1.07(a)(35)(A), (39). Brown asked Owings to leave, but Owings refused. Criminal trespass contemplates a "volitional refusal to leave when requested." *Spingola v. State*, 135 S.W.3d 330, 336 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Reed v. State*, 762 S.W.2d 640, 646 (Tex. App.—Texarkana 1988, pet. ref'd)). Although Owings eventually left the premises, she exercised a volitional refusal to leave upon Brown's request to depart.

Accordingly, at the time of Owings's arrest, Rogers was aware of facts justifying a reasonable belief that Owings was committing the offense of criminal trespass, *i.e.*, that Owings had remained at the psychiatrist's office without effective consent and received notice to depart but failed to do so. *See* Tex. Penal Code Ann. § 30.05(a); *Hilton*, 568 F.3d at 204. A reasonable officer in Rogers's position could have believed, even if mistakenly, that probable cause existed to arrest Owings for criminal trespass. *See Mendenhall*, 213 F.3d at 231. Because Rogers's conduct was objectively reasonable, he is entitled to qualified immunity on Owings's claim for false arrest, and we need not address whether Rogers had probable cause to arrest Owings for disorderly conduct. *See*

Beltran, 367 F.3d at 303; *see also Hilton*, 568 F.3d at 204; *Mendenhall*, 213 F.3d at 231; Tex. R. App. P. 47.1. We sustain issue one.

Excessive Force

In issue two, Rogers contends that qualified immunity bars Owings's excessive force claim because Owings's injuries do not support a claim for excessive force.

"The right to be free from excessive force is included under the Fourth Amendment's prohibition against unreasonable seizures of the person." *Andrews v. Fuoss*, 417 F.3d 813, 818 (8th Cir. 2005). To prevail on an excessive force claim, a plaintiff must establish (1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable. *Freeman v. Gore*, 483 F.3d 404, 416 (5th Cir. 2007). "[W]hether a plaintiff's alleged injury is sufficient to support an excessive force claim is context-dependent and is 'directly related to the amount of force that is constitutionally permissible under the circumstances.'" *Id.* (quoting *Ikerd v. Blair*, 101 F.3d 430, 435 (5th Cir. 1996)).

"A law enforcement officer's right to arrest necessarily carries with it the ability to use some force in making the arrest." *Brown v. City of Huntsville*, 608 F.3d 724, 740 (11th Cir. 2010). "For even minor offenses, permissible force includes physical restraint, use of handcuffs, and pushing into walls." *Id.* "Even if an officer is mistaken in assessing the amount of force necessary to effectuate an arrest, that mistake is entitled to

qualified immunity so long as it is reasonable." *Battiste v. Rojeski*, 257 F.Supp.2d 957, 960 (E.D. Mich. 2003).

"Allegations of excessive force by police officers during arrest are analyzed for 'objective reasonableness,' viewed from the on-scene perspective of a reasonable officer 'often forced to make split second judgments . . . about the amount of force that is necessary in a particular situation' without the benefit of hindsight." *Galvan v. City of San Antonio*, No. 08-51235, 2010 U.S. App. LEXIS 11114, at *4 (5th Cir. June 1, 2010) (quoting *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). "The objective-reasonableness inquiry is fact-intensive, requiring consideration of circumstances such as '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.'" *Id*. at **4-5.

The Eleventh Circuit has examined cases involving facts similar to the present case and found the force used insufficient to constitute a constitutional violation. In *Secondo v. Campbell*, 327 Fed. Appx. 126 (11th Cir. 2009), cited by Rogers, Deputy Folsom handcuffed Secondo with Secondo's hands behind his back, after Secondo told Folsom that he recently underwent surgery and could not place his hands behind his back. *Secondo*, 327 Fed. Appx. at 128. Secondo described Folsom's actions as follows:

> And the next thing I know, I was being grabbed. My arm was twisted. Both my arms were twisted behind my back, pulled back in a very -- in a forceful manner. Then my arms were kind of pushed up, at which point I felt pops in my shoulders, great discomfort in my shoulders. Cuffs were

> locked down on my wrists, and I felt a great deal of pain in my arms, looked down and saw my arms were swelling up. In fact, the wrists, both my wrists had swollen above the height of the handcuffs. And I was pleading to have the handcuffs removed from my wrists, to have me recuffed in the front of my body. And I was reeling in pain. . . . [Folsom put his hand] on my head, and with a pushing motion down and twisting, I was forced -- pushed into the car, at which time, when I was pushed into the car, I felt tingling in my fingers, and I complained about excessive amounts of pain in my arms, that I was having a tingling sensation, and I kept complaining while I was in the back of the patrol car.

Id. at 128-29. Secondo argued that Folsom used excessive force when arresting him, which aggravated a preexisting injury to his right shoulder and caused a new injury to his left shoulder. *Id*. at 132. The Eleventh Circuit concluded that "the evidence presented by Secondo and the reasonable inferences derived therefrom fail to meet the 'objectively reasonable' test[.]" *Id*.

> Although Secondo informed Folsom about his right-shoulder injury prior to being handcuffed, we have observed that "a police officer need not credit everything a suspect tells him . . . [and] [t]his idea is especially true when the officer is in the process of handcuffing a suspect." We also find it notable that Folsom readjusted Secondo's handcuffs only five minutes after Secondo began to register his discomfort.
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> Moreover, although Secondo's arrest was for a relatively minor infraction and he did not resist arrest in any way, our view of the record evidence does not reveal any indication that Folsom handled Secondo in an objectively unreasonable manner. The action of handcuffing a suspect and placing him or her in a patrol car necessarily requires a certain degree of force. Although Secondo maintains that Folsom's use of force in both handcuffing him and in placing him in the patrol car was excessive, the record evidence offers no suggestion that Folsom proceeded any differently than a reasonable officer would under similar circumstances.

Id. at 132-33 (internal citations omitted).

In *Rodriguez v. Farrell*, 280 F.3d 1341 (11th Cir. 2002), Sergeant Farrell grabbed Rodriguez's arm, twisted it around Rodriguez's back, jerked it up high to the shoulder, and handcuffed Rodriguez as he fell to his knees screaming that Farrell was hurting him. *Rodriguez*, 280 F.3d at 1351. Rodriguez suffered "loosening of the internal surgical hardware," "displacement of a key bone fragment[,]" more than twenty-five subsequent surgeries, and amputation of the arm below the elbow. *Id*. The Eleventh Circuit stated, "[t]he handcuffing technique used by Sgt. Farrell is a relatively common and ordinarily accepted non-excessive way to detain an arrestee." *Id*. The evidence did not show that Farrell knew about Rodriguez's prior elbow surgery or knew that the handcuffing would "seriously aggravate [Rodriguez's] preexisting condition." *Id.* The Eleventh Circuit explained that a court does "not use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time of the act. What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time." *Id*. at 1353.

In this case, criminal trespass is a misdemeanor offense, and Owings testified that she did not resist. *See* Tex. Penal Code Ann. § 30.05(d) (West Supp. 2010). Rogers allegedly pushed Owings against the wall, twisted her arms behind her back, and pulled her arms up to her shoulders, during which Owings told Rogers that he was "hurting" and "killing" her. Owings initially testified that she did not tell Rogers about her preexisting

injury, but subsequently testified that she might have told Rogers about the injury. Owings alleges that her arrest resulted in bruising to her wrists, aggravation of a preexisting injury to her right shoulder, and a new injury to her left shoulder.

Owings contends that Rogers's use of force was unreasonable because he lacked probable cause to effectuate an arrest. However, even assuming the absence of probable cause, an excessive force claim is "separate and distinct from [an] unlawful arrest claim," and is analyzed "without regard to whether the arrest itself was justified." *Freeman*, 483 F.3d at 417.

With regard to whether Rogers's use of force was reasonable, the alleged bruising to Owings's wrists is a *de minimis* injury insufficient to establish excessive force. *See id.* ("minor, incidental injuries that occur in connection with the use of handcuffs to effectuate an arrest do not give rise to a constitutional claim for excessive force."); *see also Rodriguez*, 280 F.3d at 1351 ("Painful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal."). Assuming that Owings disclosed her preexisting shoulder injury to Rogers during the arrest, he was not required to credit Owings's statements made during handcuffing, and the record does not indicate that he knew his actions would seriously aggravate her preexisting injury. *See Secondo*, 327 Fed. Appx. at 132; *see also Rodriguez*, 280 F.3d at 1351, 1353. Once Rogers became aware of Owings's shoulder injury, he applied two sets of handcuffs to lessen the pressure on Owings's shoulders. *See Secondo*, 327 Fed. Appx. at 132.

The record does not demonstrate that Rogers handled Owings in an objectively unreasonable manner. *See id.* at 132-33. Given Owings's argumentative, "irate," and "threatening" behavior in the psychiatrist's office, an officer in Rogers's position could reasonably believe that Owings was likely to be aggressive. As Buckholtz stated, Owings's behavior in the psychiatrist's office could lead a reasonable officer to conclude that immediate arrest was justified. Buckholtz, who accepted Owings's statements as true, concluded that Owings's demonstration of the arrest shows that she kept her arms straight instead of bending her arms at the elbows to facilitate her arrest; thus, "only her own resistance would have prevented her elbows from bending naturally." Even Owings testified that "[arms] don't go behind your back when you're straight like that. You have to bend them." Based on Owings's conduct in the psychiatrist's office and her videotaped demonstration of the arrest, a reasonable officer in Rogers's position could have believed, even if mistaken, that Owings was resisting and that force was needed to effectuate an arrest. *See Battiste*, 257 F.Supp.2d at 960. Rogers's actions of pushing Owings against the wall, physically restraining her, and twisting her arms behind her back to apply handcuffs were permissible. *See Brown*, 608 F.3d at 740; *see also Secondo*, 327 Fed. Appx. at 132-33; *see Rodriguez*, 280 F.3d at 1351, 1353. Because Rogers's conduct was objectively reasonable, he is entitled to qualified immunity on Owings's excessive force claim. We sustain issue two.

Malicious Prosecution

In issue three, Rogers contends that qualified immunity bars Owings's claim for malicious prosecution because Owings cannot demonstrate that "Rogers violated any clearly established federal constitutional rights that attached in the context of a criminal prosecution."

"'[M]alicious prosecution' standing alone is no violation of the United States Constitution, and [] to proceed under 42 U.S.C. § 1983 such a claim must rest upon a denial of rights secured under federal and not state law." *Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003).

> [C]ausing charges to be filed without probable cause will not without more violate the Constitution. So defined, the assertion of malicious prosecution states no constitutional claim. It is equally apparent that additional government acts that may attend the initiation of a criminal charge could give rise to claims of constitutional deprivation.
>
> The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection -- the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued. Such claims of lost constitutional rights are for violation of rights locatable in constitutional text, and some such claims may be made under 42 U.S.C. § 1983. Regardless, they are not claims for malicious prosecution and labeling them as such only invites confusion.

Id. at 953-54.

We have already determined that Rogers had probable cause to arrest Owings and that his use of force to effectuate her arrest was objectively reasonable. That charges against Owings were not pursued does not establish a Fourth Amendment violation. *See*

Castellano, 352 F.3d at 953; *see also Price v. Roark*, 256 F.3d 364, 370 (5th Cir. 2001). Moreover, "there [i]s no Fourteenth Amendment 'liberty interest' or substantive due process right to be free from criminal prosecution unsupported by probable cause." *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 814 (5th Cir. 2010), *pet. for writ of cert. filed.* Owings asserts no other constitutional violation in support of her malicious prosecution claim, nor does she assert any consequences that occurred independent of her arrest. *See Price*, 256 F.3d at 370. Because malicious prosecution alone does not constitute a constitutional violation, Rogers is entitled to qualified immunity on Owings's claim for malicious prosecution. *See Castellano*, 352 F.3d at 953; *see also Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 658 (5th Cir. 2004); *Price*, 256 F.3d at 370. We sustain issue three.

Official Immunity

In issues four and five, Rogers contends that official immunity bars Owings's claims for false imprisonment and assault and battery.

"Official immunity protects public officials from suit arising from performance of their (1) discretionary duties (2) in good faith (3) within the scope of their authority." *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 422 (Tex. 2004). "[P]ublic officials act within the scope of their authority if they are discharging the duties generally assigned to them." *Id*. at 424. "If an action involves personal deliberation, decision, and judgment . . . it is discretionary." *Id*. at 425.

As noted earlier, the parties do not dispute that Rogers acted within his discretion and the scope of his authority when arresting Owings. To determine whether Rogers acted in good faith, we "ask whether a reasonably prudent official, under the same or similar circumstances, could have believed that his conduct was justified based on the information he possessed when the conduct occurred." *Id.* at 426. "The standard of good faith as an element of official immunity is not a test of carelessness or negligence, or a measure of an official's motivation." *Id.* "This test of good faith does not inquire into 'what a reasonable person *would have done*,' but into 'what a reasonable [person] *could have believed*.'" *Id.* (quoting *Telthorster v. Tennell*, 92 S.W.3d 457, 465 (Tex. 2002)).

False Imprisonment

In issue four, Rogers contends that official immunity bars Owings's claim for false imprisonment because he acted in good faith.

"'The essential elements of false imprisonment are: (1) willful detention; (2) without consent; and (3) without authority of law.'" *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002) (quoting *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985)). "[I]f the alleged detention was performed with the authority of law, then no false imprisonment occurred." *Wal-Mart Stores, Inc. v. Resendez*, 962 S.W.2d 539, 540 (Tex. 1998). "Legal authority or legal justification is met either by the procurement of an arrest warrant or by the showing of existence of probable cause."

Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 519 (Tex. App.—San Antonio 1996, writ denied).

Rogers willfully detained Owings without her consent. However, Rogers had legal authority to arrest Owings because the facts and circumstances within Rogers's knowledge, including information from the 911 operator, were sufficient to cause a person of reasonable caution to believe that Owings had committed criminal trespass, *i.e.*, that Owings had remained at the psychiatrist's office without effective consent and received notice to depart, but failed to do so. *See Padilla v. Mason*, 169 S.W.3d 493, 503 (Tex. App.—El Paso 2005, pet. denied). A reasonably prudent officer in Rogers's position could have believed that arresting Owings for criminal trespass was justified based on the information available at the time of Owings's arrest. Because Rogers acted in good faith when arresting Owings, he is entitled to official immunity on Owings's claim for false imprisonment. We sustain issue four.

Assault and Battery

In issue five, Rogers contends that official immunity bars Owings's claim for assault and battery because he could have reasonably believed that the force used to arrest Owings was justified.

"[W]hen a suspect sues for injuries sustained during an arrest[,] the officer-defendant, to establish his good faith for official-immunity purposes, must show that a reasonably prudent officer, under the same or similar circumstances, could have believed

that his conduct was justified based on the information he possessed when the conduct occurred." *Telthorster*, 92 S.W.3d at 467. "To controvert the defendant's good-faith evidence, the nonmovant must show more than that the defendant was negligent or that reasonably competent officers could disagree on the issue; instead, the nonmovant must show that no reasonably prudent officer could have believed that the defendant's conduct was justified under the circumstances presented." *Id.*

At the time Rogers arrested Owings, he knew that Owings had recently caused a disturbance in the psychiatrist's office. Rogers testified that Owings did not immediately comply with his various requests and that Owings "used physical force" to resist, such that Rogers felt the need to "maintain physical control" over Owings. Buckholtz concluded that "a reasonable law enforcement officer in the position of Deputy Rogers could have believed that the use of force employed to arrest Ms. Owings was reasonable and not excessive."

Based on Rogers's evidence, a reasonably prudent officer, under the same or similar circumstances, could have believed that force was justified to achieve physical control over Owings to place her in handcuffs. *See Telthorster*, 92 S.W.3d at 467; *see also Padilla*, 169 S.W.3d at 503. Owings failed to produce evidence showing that no reasonably prudent officer could have believed that Rogers's conduct was justified under the circumstances. *See Telthorster*, 92 S.W.3d at 467; *see also Padilla*, 169 S.W.3d at 503. Because Rogers satisfied his summary judgment burden of showing that he acted in

good faith, he is entitled to official immunity on Owings's claim for assault and battery. We sustain issue five.

Conclusion

In summary, Rogers is entitled to qualified immunity on Owings's section 1983 claims for false arrest, excessive force, and malicious prosecution, and is entitled to official immunity on Owings's state law claims for false imprisonment and assault and battery. For these reasons, the trial court erred by denying Rogers's motion for summary judgment on the basis of qualified and official immunity. Having sustained Rogers's five issues, we reverse the trial court's summary judgment order and render judgment dismissing Owings's claims against Rogers.

REVERSED AND RENDERED.

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STEVE McKEITHEN
Chief Justice

Submitted on March 23, 2011
Opinion Delivered May 12, 2011

Before McKeithen, C.J., Gaultney and Horton, JJ.