International Municipal Lawyers Association
www.imla.org

IMLA NEWS
Issue 19 – November 21, 2019

Police: Qualified Immunity for Use of Pepper Spray but not for Subsequent Tasing

Johnson v. McCarver, No. 18-1148 (8th Cir. Nov. 1, 2019)

Affirming in part the lower court, the Eighth Circuit finds that officers who tased a man waiting outside a nightclub 15 minutes after being asked to leave, and who was filming officers on his cell phone, were not entitled to qualified immunity.

Tom Johnson, a former defensive tackle for the Minnesota Vikings, was waiting in the lobby of a nightclub in October 2014. The establishment had closed for the night and the club's lead doorman informed Johnson that he needed to leave. He did not. Two off-duty officers working for the club, including Patrick McCarver, then asked Johnson to leave. When he did not, the officers began to edge him towards the door. He sprang back and was pepper-sprayed, whereupon the officers pushed him outside. Johnson then called a car to drive him home. More than fifteen minutes later, the officers walked out of the club, and Johnson began filming them with his cell phone camera.

McCarver slapped the cell phone out of Johnson's hand, and the phone hit the ground and shattered. Johnson stood up, bent over, picked up the phone, and sat back down. Both officers turned on their tasers, and McCarver tased Johnson in the back, pulling the trigger twice. The first time McCarver squeezed the trigger for nine seconds; the second time for five. Johnson fell to the ground, the officers put him on his side, handcuffed him and took him to the Hennepin County Jail for booking. The county attorney charged Johnson with trespass, disorderly conduct, and obstructing legal process, but after a week-long trial, a jury acquitted him of all charges.

Johnson sued, alleging violation of his Fourth Amendment right to be free from unreasonable seizure without probable cause and violation of the First Amendment because the officers carried out a retaliatory arrest based on his exercise of a right to free speech to film them. (Other state law claims were dropped).The officers moved for summary judgment on the qualified immunity grounds, but the district court denied the motion, concluding that there were genuine disputes of material fact that required a trial.

An arrest generally does not violate the Fourth Amendment or the First Amendment when supported by probable cause that the arrestee committed a misdemeanor offense in the presence of an arresting officer. Here, qualified immunity would apply to these First and Fourth Amendment claims if Johnson's arrest was supported by at least arguable probable cause, which exists "if it turns out that an officer lacked adequate grounds for an arrest, but made an objectively reasonable mistake about the existence of probable cause." The officers contended that there was at least arguable probable cause to arrest Johnson for trespass, obstruction of justice, and disorderly conduct.

Under Minnesota law, a person commits a misdemeanor when he "trespasses on the premises of another and, without claim of right, refuses to depart from the premises on demand of the lawful possessor. A police officer can be the agent of a private landowner for the purpose of conveying a demand to depart.

Johnson contended that he did not trespass, because he had a claim of right to remain in the lobby to wait for his car, and minimal further investigation would have verified that right. But the Circuit found that even if Johnson initially had a right to wait in the lobby, a reasonable officer could have believed that the club--or the officers themselves—had revoked that right by directing Johnson to leave, and minimal further investigation would not have affected that conclusion. What the officers saw, in addition to what the club told McCarver and Johnson's resistance to the officers' commands to leave, provided arguable probable cause to arrest for trespass.

In denying qualified immunity, the district court thought "[t]he fact that the officers allowed a substantial length of time to pass before arresting Johnson casts doubt on the officers' claim that they had probable cause to arrest him." The Circuit found that analysis confused the subjective beliefs of the officers with the objective requirements of the Fourth Amendment. "Whether the officers subjectively thought there was probable cause to arrest for trespass is irrelevant. . . . We examine only the objective question whether the circumstances known to the officers established a fair probability that Johnson committed an offense." Arguable probable cause that Johnson had committed an offense inside the club continued to exist fifteen minutes later when the officers arrested Johnson.

Johnson also asserted that the officers violated his due process by falsifying a report of his arrest. But any post-trial claim based on the alleged false report required a showing that the report deprived Johnson of liberty in some way. Because the jury had acquitted Johnson, he had suffered no such deprivation of liberty after the trial.

The officers were therefore entitled to qualified immunity on Johnson's Fourth Amendment claim alleging false arrest, his First Amendment retaliatory arrest claim and his due process claim.

Johnson also asserted that the officers violated his rights when they shoved him in the club lobby, applied pepper spray in his face at the club's exit, and stunned him with a taser while he waited outside the club. Under *Graham*, an officer's use of force violates the Fourth Amendment if it is objectively unreasonable, judged from the perspective of reasonable officers on the scene, "in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

Here, Johnson backed against the partially open door but did not exit, instead stopping and holding his arms in front of his chest. Given Johnson's apparent resistance, size, and strength, the officers' use of pepper spray was reasonable; the Circuit found they were entitled to qualified immunity on Johnson's claims alleging use of excessive force inside the club.

But the Circuit did not agree as to the tasing outside the club. It was undisputed that more than fifteen minutes after Johnson exited the club, the officers went outside and saw him filming them with his cell phone. The descriptions of what then transpired vary, but the Circuit found more plausible Johnson's version that he was seated peacefully on the planter when McCarver tased him. At the time of the incident, it was clearly established that it was unreasonable under the Fourth Amendment to apply a taser to a "nonviolent, suspected misdemeanant who was not fleeing or resisting arrest, [and] who posed little to no threat to anyone's safety.". Taking the facts in the light most favorable to Johnson, therefore, McCarver violated this clearly established right when he applied the taser.

The Circuit therefore reversed the district court's order denying qualified immunity on Johnson's claims alleging false arrest, retaliatory arrest, deprivation of liberty without due process, and use of excessive force inside the club, but affirmed the order with respect to Johnson's claim alleging use of excessive force by the taser.

DISSENT: Judge Kelly disagreed, that the officers were entitled to qualified immunity on Johnson's Fourth Amendment claims for false arrest and excessive force, as well as his First Amendment retaliation claim.

Under Minnesota law, an act is not trespass if "committed in good faith by one who actually . . . believes that he is authorized" to remain on the premises. A person's belief that he has a right to remain on the premises need not be factually correct; a mistaken but reasonable claim of right is a defense to trespass. Johnson was waiting for the valet to bring his vehicle giving him a reasonable belief that he could remain in the lobby. "Viewing the facts in the light most favorable to Johnson, he was not refusing to leave the premises, and his right to remain in the lobby had not been revoked. Rather, he was lawfully inside awaiting the valet. As such, the elements of trespass were not satisfied, and the officers are not entitled to qualified immunity on Johnson's false arrest claim."

Judge Kelly also believed Johnson's First Amendment retaliation claim was viable, because he was engaged in protected activity while filming the officers. They argued that they were entitled to qualified immunity because Johnson's right to record and photograph them was not clearly established. As Judge Kelly put it, "While this Court has not decided this precise question, I would join every circuit that has done so and hold that the First Amendment protects the right to record police officers in public."

He also disagreed with the majority's *Graham* analysis. To him, the officers' use of force was objectively unreasonable. Johnson had not committed any crime before McCarver directly pepper-sprayed his face, and a reasonable officer would not have thought Johnson posed an immediate threat to anyone's safety or that Johnson was resisting arrest. By the time the officers acted in October 2014, the Circuit had held that it was objectively unreasonable for the police to use pepper spray on a non-fleeing, non-violent suspect who "took a few steps backward, put his hands up, and said '[y]ou can't handle me like that'" immediately before being pepper-sprayed.

LINK