United States District Court
District of Massachusetts

WAKEELAH A. COCROFT, PLAINTIFF	)	**CIVIL ACTION NO.** 4:10-cv-40257-TSH
v.	)	
JEREMY SMITH, DEFENDANT.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Introduction

This is a civil rights action brought by Wakeelah A. Cocroft, an African American woman from Chicago, Illinois, against Jeremy Smith, a Worcester police officer. In December 2007, Cocroft visited family in Worcester for the holidays. At 7:00 a.m. on December 29, Cocroft and her sister, Clytheia Mwangi, were driving to Mwangi's workplace. Mwangi, the driver, was pulled over for speeding by Officer Smith. A reasonable jury could find, based upon the disputed facts, that Cocroft was then subjected to an unlawful arrest accomplished with excessive force. Specifically, based on Cocroft's refusal to stop protesting Smith's treatment of Mwangi, Smith arrested Cocroft, pulled her from the car, wrestled her to the ground, and impeded her breathing for several minutes by putting his knee in her back.

Although Smith contends that he had probable cause to arrest Cocroft and grounds to use such harsh force, abundant record evidence would permit a jury to find otherwise. Far from suggesting that Smith had probable cause to charge

disorderly conduct—the putative basis for the arrest—the evidence instead shows that Smith unlawfully arrested Cocroft merely for talking back. Although Cocroft was later convicted of resisting that arrest, that conviction was possible only because Massachusetts law generally does not permit citizens to resist unlawful arrests. In fact, both the trial court and the appeals court in Cocroft's criminal case acknowledged that Cocroft might have been arrested based on her speech, rather than any disorderly conduct. Moreover, a jury could find that Cocroft's actions, even if sufficient to constitute "resistance" under Massachusetts law, were insufficient to justify Smith's violent response.

Accordingly, Cocroft respectfully submits this memorandum and accompanying Statement of Disputed Facts ("Cocroft Facts") in opposition to defendant Smith's motion for summary judgment. For the reasons stated below, Cocroft is entitled to a trial on all counts in her complaint.

Argument

I. Summary Judgment Standard

Summary judgment is warranted if the record evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Uncle Henry's, Inc. v. Plant Consulting Co., 399 F.3d 33, 41 (1st Cir. 2005) (quoting Fed. R. Civ. P. 56(c)). A fact is material so long as it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is warranted only if a reasonable jury could not return a verdict for the nonmovant. Ibid. A court

reviewing a summary judgment motion is "obliged to view the record in the light most favorable to the nonmoving party, and to draw all reasonable inferences in the nonmoving party's favor." LeBlanc v. Great American Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993).

II. There is ample evidence to support Count One's allegations that Officer Smith violated Cocroft's Fourth Amendment rights (Count One).

The evidence on Count One—alleging that Smith unlawfully seized and arrested Cocroft, and then used excessive force, in violation of the Fourth Amendment—is more than sufficient to survive summary judgment. Particularly when viewed in the light most favorable to Cocroft, the evidence establishes that Smith arrested her without probable cause and, after Cocroft offered meager resistance, applied excessive force.

The defense's contrary arguments misapprehend the governing law and the record. With respect to the law, Smith asserts that Cocroft's conviction for resisting arrest establishes that "Smith had probable cause to arrest [Cocroft]." Smith S.J. Mot. 2; Smith S.J. Memo 5-13. With respect to the facts, Smith seems to assert that Cocroft's claim of excessive force boils down to an accusation that Smith "forc[ed] [her] to the ground and plac[ed] handcuffs on [her] behind [her] back." Smith S.J. Memo 7. Neither of those assertions is correct.

A. Officer Smith lacked probable cause to arrest Cocroft.

A jury could easily find that Smith's arrest of Cocroft violated the Fourth Amendment. Smith lacked probable cause and unlawfully arrested Cocroft merely

for talking back to him. Cocroft's subsequent conviction for resisting that arrest does not imply that the arrest was proper at the start.

1. Officer Smith arrested Cocroft for talking back.

Under § 1983, "[an] unlawful arrest claim require[s] a showing that [the officer] lacked probable cause to arrest [the plaintiff]." Correia v. Feeney, 620 F.3d 9, 12 (1st Cir. 2010). Probable cause exists if "the facts and circumstances within the police officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the defendant had committed or was committing an offense." Rivera v. Murphy, 979 F.2d 259, 263 (1st Cir. 1992). The existence of probable cause is "an issue for the jury" if "'there is room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them.'" Nuon v. City of Lowell, 768 F. Supp. 2d 323, 330 (D. Mass. 2011) (quoting Maxwell v. City of Indianapolis, 998 F.2d 431, 434 (7th Cir. 1993)).

In this case, a physical encounter began when Smith pulled Cocroft from the car, putatively to arrest her for disorderly conduct. The Massachusetts disorderly conduct statute, Massachusetts G.L. ch. 272, § 53, reaches only conduct proscribed in "'subsections (a) and (c) of § 250.2 of the Model Penal Code.'" Nuon, 768 F. Supp. 2d at 330. Those subsections, in turn, require proof of "(a) engage[ment] in fighting or threatening, or in violent or tumultuous behavior; . . . or (c) creat[ing] a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.'" Id. (quoting Model Penal Code § 250.2).

As Magistrate Judge Sorokin recently observed, "federal and Massachusetts case law [has] clearly established that neither speech nor expressive conduct can properly form the basis of an arrest for disorderly conduct." Nuon, 768 F. Supp. 2d at 333. The Supreme Court has held that "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." Houston v. Hill, 482 U.S. 451, 461 (1987). Likewise, the Supreme Judicial Court long ago held that § 53 "cannot be validly applied against persons for the use of offensive and abusive language." Commonwealth v. A Juvenile, 334 N.E.2d 617 (Mass. 1975).

Here, Smith violated that clearly established law by arresting Cocroft for talking back to him. While Cocroft tried to pump gas and voice her concerns about Smith's behavior, Smith ordered Cocroft both to stop talking and to return to the car. But he threatened her with arrest only for talking. He said, "If you say anything else, I will arrest you." Cocroft Facts ¶ 6c. Cocroft evidently did say something else, and Smith unlawfully arrested her for it. Id. ¶¶ 6d, 6e, 8a-8f.

The evidence refutes any claim that Smith had probable cause to arrest Cocroft when he pulled her from the car. Cocroft was following Smith's order—i.e., she was returning to the car—when he turned around and decided to arrest her. Cocroft Facts ¶¶ 8a-8f. And Smith himself has testified that, when Cocroft continued to speak, he decided to arrest Cocroft based on "those words." Id. ¶ 6e. At worst, those words amounted to Cocroft "expressing [her] opinion regarding the

actions of a public official." Nuon, 768 F. Supp. 2d at 333. They yielded "no probable cause that [Cocroft] was committing the offense of disorderly conduct." Id.

2. The criminal case confirms that Smith lacked probable cause.

Smith argues that Cocroft's conviction for resisting arrest establishes the existence of probable cause for purposes of this case, but that argument is flatly incorrect. In the criminal case, both the trial judge and the Massachusetts Appeals Court ruled that Cocroft could be convicted of resisting arrest even if Smith unlawfully arrested Cocroft. Thus, Cocroft's resisting arrest conviction is consistent with the allegation that she was arrested without probable cause.

Federal courts must give "full faith and credit" to state court judgments. 28 U.S.C. § 1738. This mandate 'requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.'" Cruz v. Melecio, 204 F.3d 14, 18 (1st Cir. 2000) (quoting Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982)). In Massachusetts, a party may preclude an opponent from relitigating any issue that was decided against that same opponent in a criminal case. Aetna Cas. & Sur. Co. v. Niziolek, 481 N.E.2d 1356, 1360 (Mass. 1985); see also Kobrin v. Bd. of Registration in Med., 832 N.E.2d 628, 634 (Mass. 2005).

Issue preclusion applies "'when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.'" Martin v. Ring, 514 N.E.2d 663, 664 (Mass. 1987) (quoting Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A., 479 N.E.2d 1386 (Mass. 1985)); see

also In re Sonus Networks, Inc, Shareholder Derivative Litig., 499 F.3d 47, 57 (1st Cir. 2007). The central inquiry is whether the party against whom preclusion is sought "had a full and fair opportunity to litigate the issues the first time." Alba v. Raytheon Co., 809 N.E.2d 516, 523 (Mass. 2004). In Niziolek, for example, a defendant who was convicted of setting his home on fire and fraudulently collecting the insurance proceeds was estopped from denying in a civil suit that he caused his house to burn with the intent to defraud.

Here, Cocroft's conviction for resisting arrest does not even imply, let alone establish, that she resisted a lawful arrest. Massachusetts law makes it a crime to resist both lawful and unlawful arrests, so long as the arresting officer was not (or not yet) "resorting to unreasonable or excessive force giving rise to the right of self-defense." Mass. G.L. ch. 268, § 32B(b). Consistent with that law, the jury in Cocroft's criminal case was permitted to convict her of resisting arrest even though the court, Judge Paul A. Losapio, dismissed the disorderly conduct charge at the close of the prosecutor's case. Judge Losapio reasoned that "there's no basis to resist an unlawful arrest." Trial Tr. 111.[1] The Appeals Court took the same approach; it affirmed Cocroft's conviction after recognizing that "[r]esisting arrest is a crime even when the predicate for the arrest is unlawful." Commonwealth v. Cocroft, 956 N.E.2d 264, 2011 WL 5119106, at *2 n.1 (Mass. App. Ct. 2011) (unpublished) (citing Mass. G.L. c. 268, § 32B(b)). Thus, the jury that convicted Cocroft of resisting arrest

[1] Citations to "Trial Tr." refer to the transcript of Cocroft's state criminal trial in Worcester District Court, on January 22, 2009. It is Exhibit **B** of the Affidavit of Beverly B. Chorbajian, filed with this pleading.

was not required to find, and did not in fact find, that the arrest was supported by probable cause.

The defense's contrary argument relies on an unpublished First Circuit case discussing a Rhode Island conviction. Smith S.J. Memo 6 (citing Yates v. Gawell, 1994 WL 558160 (1st Cir. 1994) (per curiam)). Unlike in Cocroft's case, the trial court in Yates actually convicted the plaintiff of the offense for which he had been arrested, and that conviction was "determinative on the issue of probable cause under Rhode Island law." 1994 WL 558160, at *1. Yates is irrelevant here because Cocroft was not convicted of disorderly conduct, and her conviction for resisting arrest did not determine the issue of probable cause under Massachusetts law.

In fact, Cocroft's criminal case shows that Smith lacked probable cause of disorderly conduct. To convict Cocroft of resisting arrest, the jury was required to find that she "knew at the time that she was acting to prevent an arrest." Trial. Tr. 189. On appeal, Cocroft argued that she had no such knowledge because Smith took her by surprise. But the Appeals Court ruled that there was sufficient evidence that Cocroft understood she was being arrested, given "Smith's clear and direct warning to the defendant that she would be arrested if she continued to speak." 2011 WL 5119106, at *2 (emphasis added). The Appeals Court also noted that Cocroft was arrested for conduct having "free speech aspects." Id. at *2 n.1. Thus, the Appeals Court relied on a rationale that would make Smith's arrest unlawful, because "continu[ing] to speak" cannot supply probable cause of disorderly conduct.

Nor could Cocroft's subsequent resistance retroactively supply probable cause. "The only resistance that can provide probable cause for [an] arrest must, necessarily, precede the arrest." Keylon v. City of Albuquerque, 535 F.3d 1210, 1217 (10th Cir. 2008). Thus, "[a]lthough [Smith] had probable cause to arrest [Cocroft] upon [her] resisting, [he is] still liable for the precipitating Fourth Amendment violation." Petro v. Town of West Warwick ex rel. Moore, --- F. Supp. 2d ----, 2012 WL 3879971, at * 25 (D.R.I. Sept. 7, 2012).

B. Officer Smith also used excessive force.

The present record would also permit a jury to find that Smith used excessive force. Even taking into account Cocroft's resistance, the evidence raises a material dispute as to whether Smith's violent response was excessive.

1. Whether Officer Smith used excessive force is a quintessential jury question.

An excessive force claim under § 1983 requires the plaintiff "to show that 'the defendant employed force that was unreasonable under all the circumstances.'" Correia v. Feeney, 620 F.3d 9, 12 (1st Cir. 2010) (quoting Morelli v. Webster, 552 F.3d 12, 23 (1st Cir. 2009)). Relevant facts include "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." Graham v. Connor, 490 U.S. 386, 396 (1989).

Contrary to the defendant's suggestion, Cocroft need not definitively "demonstrate" excessive force "in order to survive summary judgment." Smith S.J. Memo 7. Many courts, including the First Circuit, have recognized that "'[b]ecause

determining reasonableness in [the excessive force] context is such a fact-intensive endeavor[,] summary judgment is improper if the legal question of immunity turns on which version of the facts is accepted.'" Morelli v. Webster, 552 F.3d 12, 25 (1st Cir. 2009) (quoting Griffith v. Coburn, 473 F.3d 650, 656-57 (6th Cir. 2007)). Thus, the prevailing view is that "summary judgment . . . in excessive force cases should be granted sparingly." Santos v. Gates, 287 F.3d 846, 853 (9th Cir. 2002).

Applying that view, the First Circuit has been unwilling to uphold summary judgment in excessive force cases where plaintiffs have provided evidence requiring a credibility determination. See Mlodzinski v. Lewis, 648 F.3d 24, 37-38 (1st Cir. 2011) (plaintiffs supplied "bare-bones details" of police search); Morelli, 552 F.3d, at 25 (plaintiff contended that officer pulled her arm and damaged her rotator cuff); Alexis v. McDonald's Restaurants, 67 F.3d 341, 353 (1st Cir. 1995) (plaintiff supplied evidence that she was not threatening anyone or attempting to flee). In contrast, the First Circuit has upheld summary judgment where plaintiffs simply failed to dispute officers' accounts of the facts. See Berube v. Conley, 506 F.3d 79, 83-84 (1st Cir. 2007) (plaintiff admitted he possessed a weapon and threatened officers); Gaudreault v. Salem, 923 F.2d 203, 206 (1st Cir. 1990) (plaintiff substantially agreed with the officer's version of events, and injured officer); see also Morrissey v. Town of Agawam, 2012 U.S. Dist. LEXIS 96505, at *16-17 (D. Mass. July 12, 2012) (no triable issue because plaintiff had poor memory of the altercation and could not provide any affidavits or evidence to counter the officers' version of events); LaFrenier v. Kinirey, 478 F. Supp. 2d 126, 138 note 17 (D. Mass. 2007) (no

triable issue where plaintiff did not dispute any of the officer's testimony that she only escalated force in response to plaintiff's resistance to arrest).

2. The evidence of excessive force is sharply contested.

This case fits squarely within the category of excessive force claims that is inappropriate for a resolution on summary judgment. Although the defense attempts to portray this case as a dispute about whether "[f]orcing [Cocroft] to the ground and placing handcuffs on [her]" was excessive, there are material disputes both as to the severity of the force Smith applied and as to whether that force was warranted. Under Cocroft's version of the facts, "a reasonable officer should have known that the degree of force used was excessive." Morelli, 552 F.3d at 25.

With respect to Smith's conduct, Cocroft has advanced evidence that he was hostile from the start and unduly violent to the finish. Smith began yelling early during the encounter. Cocroft Facts ¶¶ 3a, 5a-5e. He first laid hands on Cocroft while she was complying with his order to return to the vehicle, ostensibly because he was arresting her for violating his order to stop talking. Id. ¶¶ 6c-6e, 8a-8f. It is unclear why Smith grabbed Cocroft without first informing her that, contrary to his most recent instructions, he now wanted her to exit the vehicle. Id.

Smith then pulled Cocroft out of the car and threw her to the other side of the gas station's island. Cocroft Facts ¶¶ 9a-9g. He scraped Cocroft's face on the cement when throwing her, pulled both of her hands behind her back to cuff her, and placed his knee on her back to hold her down. Id. ¶¶ 9g-9k. Cocroft told Smith that she could not breathe, but he still kept her in the same position for roughly five

minutes. Id. ¶¶ 10a-10e. Cocroft admits to moving her face back and forth in an effort to breathe, but made no other movements to resist the defendant once handcuffed. Id. ¶¶ 14a-14b. Cocroft suffered cuts and abrasions, and she may have damaged her rotator cuff because the defendant placed his bodyweight, about 215 pounds, on her shoulder. Id. ¶¶ 18a-18b. In no version of the facts did Cocroft attempt to flee the scene, punch, kick, or hit Smith, or verbally threaten him. Id. ¶¶ 9a-17e. Those facts are more than sufficient to survive summary judgment. See, e.g., Mlodzinski, 648 F.3d, 37-38 (unreasonable to handcuff unarmed 15 year-old girl and holding her for 7-10 minutes); Morelli, 552 F.3d, at 29 (unreasonable to hold unarmed arrestee forcefully by the arm with sufficient power to tear rotator cuff); Jennings v. Jones, 499 F.3d 2, 15-16 (1st Cir. 2007) (unreasonable to apply continued pressure to an arrestee's ankle after the arrestee stopped resisting); Alexis, 67 F.3d, 352 (unreasonable to pull plaintiff out of her restaurant booth without telling her she was under arrest).

With respect to Cocroft's conduct, the Graham factors—including the severity of the crime at issue, whether Cocroft posed an immediate threat to Smith's safety, and whether Cocroft resisted—also cut against Smith's motion for summary judgment. For starters, the arrest was for disorderly conduct. That is a minor crime, and it was particularly minor in this case because Smith unlawfully charged Cocroft based on her speech.

Next, Cocroft did not pose a threat to Smith's safety because she did not threaten him, was unarmed, and did not attack him. Cocroft Facts ¶¶ 8a-9l. To be

sure, Smith asserts that Cocroft was "hysterical," Smith S.J. Memo 3, but he does not describe any behavior by Cocroft that could have harmed him. For example, Smith contends that Cocroft dug her nails into him while he was handcuffing her, but that fact is disputed, and Smith does not even allege that Cocroft's nails broke his skin. Cocroft Facts ¶¶ 11a-11b. Similarly, a jury could easily reject Smith's assertion that the "agitat[ion]" of Cocroft's sister justified digging his knee into Cocroft's back for five minutes. Far from interfering with Smith, Mwangi was calling 911 to request additional police officers. Id. ¶ 17b. Thus, the evidence strongly suggests that Cocroft posed no risk whatsoever.

Finally, Cocroft's conviction for resisting arrest does not undercut her excessive force claim. The question of excessive force was not put before the jury in Cocroft's criminal case, Trial Tr. 189-90, so a finding that Smith used excessive force "would not be inconsistent" with Cocroft's conviction for resisting arrest. Lora-Pena v. FBI, 529 F.3d 503, 506 (3d Cir. 2008) (per curiam); see also Schreiber v. Moe, 596 F.3d 323, 334–35 (6th Cir .2010) (ruling that "[t]he mere fact that [a conviction for resisting arrest] and the § 1983 claim [for excessive force] arise from the same set of facts is irrelevant").

Moreover, police executing a valid arrest may use only the force "reasonably necessary to overcome physical resistance by the person sought to be arrested." Julian v. Randazzo, 380 Mass. 391, 396 (1980). In Massachusetts, a defendant can be convicted of resisting arrest for the use or mere threat of physical force against an officer. Mass. G.L. c. 268, § 32B (a)(1). "There is no requirement under subsection

(a)(1) that the Commonwealth show a substantial risk of causing bodily injury to the police officer or another." Commonwealth v. Katykhin, 59 Mass. App. Ct. 261, 263 (2003). In this case, any force that Cocroft applied was de minimis; she perhaps "raised her legs, tucked in her arms, made [the defendant] support her weight." Smith Dep.49:7-8. Even if that conduct was sufficient to support a conviction for resisting arrest, Smith could not have believed that it was "reasonably necessary" to throw Cocroft around like a rag doll and pin her to the ground for five minutes.

Indeed, pinning Cocroft appears to have violated the Worcester Police Department Use of Force policy, which requires placing restrained prisoners on their backs or in seated positions to allow for breathing. Cocroft Facts ¶ 17a**.** Continuing to apply pressure when an arrestee "cease[s] resisting," especially after they indicate distress, is unreasonable force. Jennings, 499 F.3d at 14-15.

C. Smith is not entitled to qualified immunity on Count One.

Although Officer Smith argues that he is entitled to qualified immunity on Count One, that argument simply restates Smith's incorrect assertion that he had probable cause to arrest Cocroft. Accordingly, the argument cannot succeed.

In evaluating a claim of qualified immunity, courts consider "(1) whether plaintiff's allegations, taken as true, establish the violation of a constitutional right, and (2) whether the constitutional right was clearly established at the time of the challenged conduct." Pearson v. Callahan, 129 S. Ct. 808, 815-16 (2009); Sanchez v. Pereira-Castillo, 590 F. 3d 31, 52 (1st Cir. 2009). The "salient question is whether the state of the law at the time of the alleged violation gave the defendant fair

warning that his particular conduct was unconstitutional." Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009).

In this case, Smith does not dispute that Cocroft had a clearly established right not to be arrested, except upon based on probable cause. Thus, Smith's claim of qualified immunity rests entirely on his assertion that "probable cause existed for [Cocroft's] arrest." Smith S.J. Memo 11. As shown above, that assertion is contradicted by the evidence in this case and the rulings in Cocroft's criminal case. Because Smith lacked probable cause, and instead unlawfully arrested Cocroft for talking back to him, he is not entitled to qualified immunity.

III. Officer Smith is not entitled to qualified immunity for violating Cocroft's First Amendment rights (Count Two).

The defense again reprises its flawed argument about probable cause when arguing for summary judgment on Count Two, a § 1983 claim alleging that Smith violated the First Amendment by arresting Cocroft for talking back to him. Smith's sole response to this count is an assertion of qualified immunity based on the claim that Smith had probable cause to arrest Cocroft. Again, that assertion lacks merit.

Just as Count Two alleges, the evidence before this Court and the rulings during Cocroft's criminal case show that Officer Smith arrested Cocroft for talking back to him. Neither the record evidence nor the criminal case suggests that Smith had independent grounds to arrest Cocroft for disorderly conduct. This case is therefore unlike Reichle v. Howards, 132 S. Ct. 1878 (2012), on which Smith relies. In Reichle, the plaintiff alleged that he was arrested in retaliation for something he said to Vice President Dick Cheney, but Secret Service officers had independent

probable cause to arrest him because he had actually touched Mr. Cheney. The Supreme Court held that the officers were entitled to qualified immunity because it was not clearly established that a retaliatory arrest, when otherwise supported by probable cause, violates the First Amendment. Here, there is abundant evidence—or at least material disputed evidence—that the retaliatory arrest of Cocroft was not otherwise supported by probable cause. Accordingly, Reichle does not control this case.

IV. There is a material issue of fact as to assault and battery (Count Three).

As Smith concedes, Cocroft's claim for assault and battery hinges on whether Smith used unreasonable force. Smith S.J. Memo 13-14. Just as a jury could find that Smith used excessive force for purposes of § 1983, a jury could find that Smith used force amounting to assault and battery under state law.

Smith's contrary argument relies on the disputed contention that his conduct amounted to merely "forcing a person to the ground and placing handcuffs on the person behind his or her back." Smith S.J. Memo. As shown above, Smith did far more than that. Cocroft Facts ¶¶ 9a-17e.

Accordingly, Smith relies on cases that are quite unlike this one. For example, seeking to justify the violent takedown of Cocroft, Smith cites a state case holding that a "leg maneuver was reasonable under the circumstances." Smith S.J. Memo 7, 14. But the case, Commonwealth v. Ferreira, No. BRCR2005-0956, 2008 WL 1932958 (Mass. Super. Ct. Mar. 17, 2008), involved the target of a vice squad

search warrant for narcotics trafficking. Ferreira "was known to members of the Vice Unit from an alleged incident where Ferreira had dragged a Fall River police officer down the street while the officer was hanging onto Ferreira's car." Id. at *1. To arrest Ferreira, three officers had to overcome his efforts to shut himself inside a car and to resist their efforts to control and handcuff him. Ferreira was ultimately found to be in possession of "substantial quantities" of heroin and cocaine. Id. at *2.

That cases is nothing like this one. While an officer in Ferreira used a "leg maneuver" against a dangerous and resistant criminal, Smith used an "arm-bar takedown maneuver" against a woman who posed no danger and was attempting to follow his order to return to the car. Cocroft Facts ¶¶ 8a-8f.

V. Smith's remaining arguments all rest on his incorrect assertion that he had probable cause (Count Four, Count Five, and Common Law Immunity).

For each of Cocroft's remaining state law claims—including allegations of false arrest (Count Four) and violations of the Massachusetts Civil Rights Act (MCRA)—Smith relies solely on the mistaken claim that he had probable cause to arrest Cocroft. Smith S.J. Memo 14-17. Once again, that claim is incorrect.

Shorn of Smith's claim about probable cause, his motion has no hope of success as to these state law claims. Quite obviously, Smith's lack of probable cause supports a state law claim for false arrest. Gutierrez v. Massachusetts Bay Transp. Authority, 772 N.E.2d 552, 564 (Mass. 2002).

The same is true of Cocroft's MCRA claim. A violation of the MCRA occurs when an officer deprives someone of a constitutional right through "threats,

intimidation, or coercion." Mass. G.L. ch. 12, §§ 11H-I. The MCRA is "coextensive with 42 U.S.C. § 1983, except that the Federal statute requires State action whereas its State counterpart does not." Bell v. Mazza, 474 N.E.2d 1111, 1114 (Mass. 1985) (internal citations and quotation omitted). "A direct violation of civil rights is not, without a showing of coercive behavior, actionable." Britton v. Maloney, 901 F. Supp. 444, 453 (D. Mass. 1995). But "'[a]rrest and detention is 'intrinsically coercive' for MCRA purposes.'" Sietins v. Joseph, 238 F. Supp. 2d 366, 378 (D. Mass. 2003). The threat of arrest equally amounts to threats, intimidation, or coercion under the MCRA. Tortora v. Inspector of Bldgs. of Tewksbury, 668 N.E.2d 876, 878 (Mass. Ct. App. 1996).

Here, Smith threatened to arrest Cocroft, and in fact arrested her, for talking back to him. That conduct amounted to a violation of Cocroft's constitutional rights through threats, intimidation, and coercion. Smith cannot seek shelter in the doctrines of qualified and common law immunity because, no matter how many times he says otherwise, a jury could easily find that Smith lacked probable cause to arrest Cocroft.

Conclusion

Cocroft respectfully submits that defendant Smith's motion for summary judgment should be denied.

Respectfully submitted,
WAKEELAH COCROFT

By her attorney,

Beverly B. Chorbajian
Bchor.law@verizon.net
BBO# 566893
390 Main St., Ste. 659
Worcester MA 01608
(508) 755-8072

On The Memorandum:

Matthew R. Segal (BBO#654489)
American Civil Liberties Union of Massachusetts
211 Congress Street
Boston, MA 02110
Tel: 617-482-3170
Fax: 617-451-0009
email: msegal@aclum.org

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