No. 14-1113

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DEPUTY J.K. MASTON, TYLER COUNTY SHERIFF'S DEPARTMENT, TROOPER S. CURRAN AND WEST VIRGINIA STATE POLICE,
Defendants Below, Petitioners,

v.

THOMAS JEFFERSON WAGNER,
Plaintiff Below, Respondent.

From the Circuit Court of Tyler County
The Honorable David W. Hummel
Civil Action No. 11-C-12

PETITIONERS' REPLY BRIEF

SUBMITTED BY:

Gary E. Pullin, Esq. WV State Bar No. 4528
Emily L. Lilly, Esq. WV State Bar No. 11045
Michelle Rae Johnson, Esq. WV State Bar No. 11869
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545
E-mail: gpullin@pffwv.com
E-mail: elilly@pffwv.com
E-mail: mjohnson@pffwv.com
Counsel for Deputy J.K. Maston, Tyler County Sheriff's Department, Trooper S. Curran and West Virginia State Police

DATE: April 1, 2015

SUMMARY OF ARGUMENT

Respondent's brief is filled with a meticulous analysis of every aspect of Corporal Curran and Deputy Maston's actions on the night of Respondent's arrest. The brief evaluates the perception of Crystal Price, the bartender at Big C's Lounge and Lillian Leeson, Respondent's tenant. The officers were not inside the bar with Respondent, as Ms. Price was, so they have no idea exactly how many beers he had consumed. Additionally, Respondent's brief repeatedly questions the officers' statements during their deposition testimony in comparison to their statements in the Report of Criminal Investigation; their failure to use the cruiser's dash camera; and the fact that Respondent's criminal charges were dismissed with prejudice. These facts are not relevant to the analysis of whether or not qualified immunity applies.

Respondent appears to have forgotten that qualified immunity protects law enforcement officer from "bad guesses in gray areas," while ensuring they may be held personally liable only "for transgressing bright lines." Maciarello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992). The issue at bar is not an example of officers transgressing a bright line. The relevant facts are simple. The officers were dispatched to 301 Main Street in Middlebourne. (Appendix p. 251.) They were responding to a call alleging that a fight was occurring along Main Street. See, Maston Depo., at p. 16. Once arriving at the location on Main Street, a couple exits Big C's; however, they didn't appear to be fighting. Id. at 21. The cruiser was parked in a manner that would allow the officers to view people exiting Big C's. Id. at 23. As the officers sat there, in the cruiser, they noticed a male "walking and staggering down the sidewalk." Id. at 25. The male, who Deputy Maston recognized as Tom Wagner, crossed Dodd Street and stopped on the corner of WV Route 18. Id. at 25, 31. According to Respondent, he inquires "[i]f everything was okay." Wagner Depo., p. 129. After hearing no response, he shouted the question again. Id. at 131. Respondent has testified that

during his interaction with the officers, the cruiser engine was running and the headlights were on. Id. at 129-130.

At this point, the officers' perception of what the Respondent said differs. The officers thought that Respondent appeared drunk and thought they heard him yelling profanity. Therefore, they requested that he stop so that a further investigation may be conducted. The Respondent was also restrained with an appropriate wrist lock, which unfortunately led to his injury.

ARGUMENT

Respondent's arguments of unlawful arrest, seizure, and unwarranted use of force are unfounded. The officers had a reasonable suspicion that Respondent was drunk and possibly involved in the fighting they were advised of by dispatch. An example of reasonable suspicion is found in U.S. v. Monica L. Amaker, 233 F. App'x 238, (4th Cir. 2007). Ms. Amaker was standing in a high crime area when officers noticed a suspected drug transaction on one side of a bar and grill. Id. At this time, an officer approached the suspect while a second officer approached Ms. Amaker in the back of an alley on the opposite side of the bar and grill. Id. The officer was in plain clothes; however, his badge was displayed. Id. Ms. Amaker saw the officer, uttered an expletive and began to run away behind the restaurant toward the other alley. Id. The officers gave chase. Ms. Amaker was eventually convicted of possession with intent to distribute fifty grams or more of cocaine base. Id. The Court held that Ms. Amaker's conviction would be upheld and there was no error in the district court's conclusion that the officers had sufficient articulable suspicion to stop Ms. Amaker. Id. In reaching this holding, the court considered the following:

> Reasonable suspicion requires more than a hunch but less than probable cause and may be based on the collective knowledge of officers involved in an investigation. Wardlow, 528 U.S. at 123, 120 S.Ct. 673; see also United States v. Hensley, 469 U.S. 221,

> 232, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). A suspect's presence in an area known for criminal activity, while insufficient by itself to justify a Terry stop, is a relevant factor in determining reasonable suspicion, as are other factors such as flight upon noticing the police. Wardlow, 528 U.S. at 124, 120 S.Ct. 673; United States v. Lender, 985 F.2d 151, 154 (4th Cir.1993).

United States v. Amaker, 233 F. App'x 238, 239. Here, Corporal Curran and Deputy Maston had a reasonable suspicion that it was necessary to stop the Respondent and conduct an investigation. This reasonable suspicion was based upon the fact that the officers had been called to respond to a fight at 301 Main Street. They arrive and see no fight; however, a man and woman exit the bar together appearing peaceful. Moments later, Respondent exits the bar, walking or staggering, turns to the officers, and shouts what they perceived as curse words. Then, Respondent claims he turned to go home as the officer failed to answer his yelling to ask if "everything was okay." However, according to the officers, they asked him to stop for questioning and he ran as they approached. It is clear that even if the evidence is taken in the light most favorable to Respondent, an objective officer would not be on notice that it was unlawful to investigate this suspicious activity. Further, upon approaching Respondent, the officers' suspicion was heightened as they approached and smelled alcohol upon his breath.

Respondent argues that Deputy Maston's statement after the incident aligns with Respondents while Corporal Curran heard Respondent "shouting profanities and acting in a manner as to provoke an altercation." (Appendix p. 257; 252-253.) However, the collective knowledge of the officers shall be used to determine if there is a reasonable suspicion to conduct an investigative stop. Wardlow, 528 U.S. at 123, 120 S.Ct. 673; see also United States v. Hensley, 469 U.S. 221, 232, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). The collective knowledge of Corporal Curran and Deputy Maston was sufficient to provide reasonable suspicion to begin an investigation into Respondent's behavior.

Additionally, Respondent's expert witness agreed that the wrist lock was an appropriate hold, and their actions were in compliance with the West Virginia State Police Departmental Policy and Procedures. (Appendix p.134, 148.) Although the claimant was physically injured, the injury was likely the result of his own resistance to the wrist lock. (Appendix p. 152.) Nothing about the officers' actions was clearly unlawful. Instead, at best, their actions would be considered a "bad guess in a grey area" and misunderstandings as to the Respondents' actions or intentions lead to their decision to pursue an investigation of his activity. U.S. v. Monica L. Amaker, 233 F. App'x 238, (4th Cir. 2007). Regardless, upon making contact with Respondent, his aggressive behavior and the smell of alcohol on his breath were discovered. Therefore, the case at bar is the precise type of action which worthy of qualified immunity.

Respondent alleges that the holding in City of St. Albans v. Botkins, is not applicable to the case at bar as that case involved two groups of young men involved in a heated confrontation outside of a fast food restaurant. 228 W.Va. 393 (2011). According to Respondent, the Court found that a reasonable officer may have determined that force was necessary. Id. Petitioner strongly disagrees that the rule of qualified immunity would not be applicable to this case merely because there was no imminent threat of violence. The U.S. Supreme Court has long held that "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or treat thereof to effect it." Graham v. Connor, 490 U.S. at 396, 109 S.Ct. 1865. Here, the officers' use of force was appropriate for the matter as a wrist lock, was the proper, and necessary, use of restraint.

The fact that the criminal charges against Respondent were eventually dismissed with prejudice and Ms. Price only served him two or three beers in a three hour time span is totally

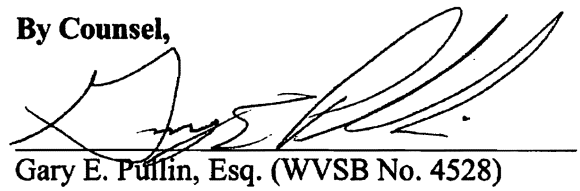
irrelevant to the legal analysis. To defeat a defense of qualified immunity, the standard turns on the "objective legal reasonableness" of the official's conduct, Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) and protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). From an objective standpoint, the officers behaved in an appropriate manner to effectuate the investigation and arrest of Respondent. The officers' actions can only be judged by the evidence available to them at the time of pursuit. The same reasoning holds true for Respondent's argument that he cannot be found to have fled the police if he did not in fact hear a call for him to halt. At the time the officers provided this instruction, they had a reasonable expectation that the Respondent would comply. When he did not, the officers, as any other objective officer would, assumed that Respondent was willfully disobeying their order. The officers should not now be mulcted in damages for pursing the investigation and eventual arrest on a suspect based upon their reasonable suspicions. Syl. pt. 1, Goines v. James, 433 S.E.2d 572, 573 (W.Va. 1993)(*citing* Syl. pt, Bennett v. Coffman, 361 S.E.2d 465 (W.Va. 1987)(emphasis added)). Therefore, Petitioners are entitled to qualified immunity, as there was no constitutional violation or unlawful behavior which a reasonable officer should have been aware of.

CONCLUSION

Based upon the foregoing, the Petitioners and Defendants below, Deputy J.K. Maston, The Tyler County Sheriff's Department, Corporal S. Curran, and the West Virginia State Police, respectfully request that the Court **GRANT** the *Petitioners' Appeal* and **REMAND** this case back to the Tyler County Circuit Court for dismissal with prejudice.

DEPUTY J.K. MASTON, TYLER COUNTY SHERIFF'S DEPARTMENT, TROOPER S. CURRAN AND WEST VIRGINIA STATE POLICE

By Counsel,



Gary E. Pullin, Esq. (WVSB No. 4528)
Emily L. Lilly, Esq. (WVSB No. 11045)
Michelle Rae Johnson, Esq. (WVSB No. 11869)

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545

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Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioners and Defendants below, does hereby certify that a true copy of the foregoing ***"DEPUTY J.K. MASTON, TYLER COUNTY SHERIFF'S DEPARTMENT, TROOPER S. CURRAN AND WEST VIRGINIA STATE POLICE PETITIONERS' REPLY BRIEF"*** was served upon counsel of record by placing the same in an envelope, properly addressed with postage fully paid and depositing the same in the U.S. Mail, on this the **1st** day of **April, 2015**.

Chad D. Haught, Esquire
Jividen Law Offices, P.L.L.C.
729 North Main Street
Victorian Old Town
Wheeling, WV 26003
Counsel for Respondent, Plaintiff Below

Gary E. Pullin, Esq. (WVSB No. 4528)
Emily L. Lilly, Esq. (WVSB No. 11045)
Michelle Rae Johnson, Esq. (WVSB No. 11869)

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
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