

THE LOCAL GOVERNMENT LIABILITY BEAT



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Eleventh Circuit Discusses Denies Immunity in Arrest of Protestor

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On December 26, 2019, the Eleventh Circuit Court of Appeals decided *Toole v. City of Atlanta et al.*,¹ in which the court examined whether an officer was entitled to qualified immunity for the arrest of a protestor. The relevant facts of *Toole*, taken directly from the case, are as follows:

Toole was involved in a protest march through the streets of downtown Atlanta following a grand jury's decision not to indict the officer involved in the shooting of Michael Brown in Ferguson, Missouri. The Atlanta Police Department (APD) used a "leapfrogging" technique to block off the protesters' route, which involved rolling closures of streets as the protesters reached them—rather than shutting down the entire protest route all at once—to minimize the march's impact on traffic. Although many of the protesters were peaceful, some individuals engaged in violence and vandalism as the protest progressed—there's no evidence that Toole was involved in these activities. Worrying that the protesters might vandalize businesses or breach a highway, the APD ordered that the protesters should be dispersed. At the time this order was issued, Toole was near the intersection of Ivan Allen Boulevard and Peachtree Street. APD officers at the intersection directed the protesters to clear the street, and the officers—including [the officer]—were instructed to arrest individuals who did not comply.

Toole heard officers ordering people to get out of the street, and he says that he got on the sidewalk immediately in response. He also claims that he heard other protesters saying that the APD was arresting people who were filming the event. Toole alleges that [the officer] pulled him off of the sidewalk and into the street, throwing him to the ground and causing several injuries, including a chipped tooth—[the officer] thereafter placed flex cuffs on Toole's wrists, arrested him, and escorted him to an APD paddy wagon. [The officer], by contrast, claims that Toole was not on the



sidewalk when he was arrested, but rather that he was still in the street.

In the moments before his arrest, Toole had been recording a video of APD officers telling the protesters to disperse—he zoomed in on an Officer Turner, getting a shot of his name embroidered on his jacket and saying his name out loud. As an officer begins to grab him, Toole can be heard in the video protesting that he was on the sidewalk. Toole’s phone continued to record during his arrest, and in a second video he can be heard repeating to officers that he had been on the sidewalk when he was arrested. His phone was returned to him before he entered the paddy wagon, and he recorded a brief video once inside documenting his facial injuries.

Toole’s videos do not clearly show whether he was on the sidewalk or the street when he was arrested, but they do show that many APD officers and vehicles were in the street, that he was seized after filming Officer Turner’s name and face, and that he consistently contended that he had been on the sidewalk at the time of his arrest. [The officer] says that he had no idea that Toole was filming on his phone at the time of his arrest.

[The officer] cited Toole for disorderly conduct under Atlanta City Ordinance § 106-81(9), which states:

It shall be unlawful for any person within the corporate limits of the city to engage in any conduct described in the following subsections; provided, however, that no person shall be convicted of any of the following sections upon a showing that the predominant intent of such conduct was to exercise a constitutional right to: . . .

(9) Stand or remain in or about any street, sidewalk, overpass or public way so as to impede the flow of vehicular or pedestrian traffic, and to fail to clear such street, sidewalk, overpass or public way after being ordered to do so by a police officer or other lawful authority . . .

This citation was ultimately dismissed, and Toole was not prosecuted.ⁱⁱ

Toole filed suit against the city and officers in federal district court and alleged that the officers violated his Fourth Amendment rights when he was arrested without probable cause and that the unlawful arrest prevented him from exercising his rights under the First Amendment. The district court denied qualified immunity for the officer that arrested Toole and that officer appealed the denial of qualified immunity to the Eleventh Circuit Court of Appeals.

The first issue on appeal was whether the officer was entitled to qualified immunity for allegation that the officer violated the Fourth Amendment when he arrested Toole, allegedly without probable cause. It is important to note that, at this stage of the litigation (a motion for qualified immunity), the

court is required to view the facts in a light most favorable to the plaintiff unless there is clear evidence, such as video, that contradicts the plaintiff’s version of events.

The court of appeals first discussed the rules related to unlawful arrest claims under the Fourth Amendment and when qualified immunity is appropriate for such claims. The court stated:

While an officer who arrests an individual without probable cause violates the Fourth Amendment, this does not inevitably remove the shield of qualified immunity. We do not automatically hold an officer liable for making an arrest that, when seen with the benefit of hindsight, turns out not to be supported by probable cause.” *Skop*, 485 F.3d at 1137. Rather, when evaluating qualified immunity, we employ a more relaxed standard of “[a]rguable probable cause”—whether “reasonable officers in the same circumstances and possessing the same knowledge as [the arresting officer] could have believed that probable cause existed to arrest” Toole. *Lee v. Ferraro*, 284 F.3d 1188, 1195 (11th Cir. 2002) (emphasis added) (quotation omitted). The arguable probable cause standard contemplates that police “officers may make reasonable but mistaken judgments regarding probable cause but does not shield officers who unreasonably conclude that probable cause exists.” *Skop*, 485 F.3d at 1137.

So, even if an officer arrests an individual without actual probable cause—in violation of the Constitution—he has not violated that individual’s “clearly established” rights for qualified immunity purposes if he nevertheless had arguable probable cause to make the arrest.ⁱⁱⁱ

Regarding his arrest, Toole alleged that officers had the road blocked for the protestors so no cars were on the road. He also alleged that when the officers told the protestors to move to the sidewalk, he complied and moved to the sidewalk, which is where he was located when his arrest began. Toole also alleged that he was arrested after he videoed another officer’s nametag and said that officer’s name aloud. As such, Toole argued that the officer lacked probable cause to arrest him.

The court of appeals then examined the elements of the city ordinance under which Toole was arrested. Basically, the ordinance required that Toole (1) remain in the street, (2) so as to impede vehicular traffic, (3) after being told to clear the street, (4) by an officer with lawful authority.

The officer argued that he had arguable and actual probable cause to believe that the elements of the ordinance were met. However, the court noted that while Toole was videoing at the time immediately prior to his arrest, the video is not clear as to whether he was in the street or on the sidewalk. Additionally, the officers did not have video to refute Toole’s allegation that he was on the sidewalk, and as previously noted, the court is required to accept the plaintiff’s version of the facts at this stage of the litigation; Toole argued he was on the sidewalk. This would fail to meet the first element of the ordinance.

Further, the officer does acknowledge, as the plaintiff stated, that the road was blocked by the police at the time of the arrest. Therefore, the second element would also not be met in that there was no vehicular traffic to impede.

In light of the above analysis, the court reasoned that the officer did not have actual probable cause to arrest Toole. However, the officer would still be entitled to qualified immunity from suit if he had “arguable probable cause” to arrest Toole. This is a more lenient standard than actual probable cause. The court then noted that they must determine, based on case law from the United States Supreme Court, the Eleventh Circuit, and the Supreme Court of Georgia, whether every reasonable officer in this situation would have realized the arrest was unlawful. The court stated:

In this case our analysis is straightforward, as “our binding precedent clearly establishe[s] . . . that an arrest made without arguable probable cause violates the Fourth Amendment’s prohibition on unreasonable searches and seizures,” *Skop*, 485 F.3d at 1143 (citations omitted), and we don’t think, at least on the facts as we must construe them, that [the officer] had arguable probable cause. This Court has consistently held that “[s]howing arguable probable cause does not . . . require proving every element of a crime,” *Brown v. City of Huntsville*, 608 F.3d 724, 735 (11th Cir. 2010) (citation omitted), but here, it seems to us that none of the elements were met, when reading the facts in Toole’s favor. No reasonable officer could have believed that there was probable cause to arrest Toole for standing in the street and impeding traffic if Toole was on the sidewalk and the streets were closed to traffic.^{iv}

Thus, the court of appeals affirmed the denial of qualified immunity for the officer on the Fourth Amendment claim.

The court then set out to determine if the officer was entitled to qualified immunity on the First Amendment claim. The general rule is that

[L]aw enforcement officers may not arrest an individual as a way “to thwart or intrude upon First Amendment rights otherwise being validly asserted.” *Kelly v. Page*, 335 F.2d 114, 119 (5th Cir. 1964).^v

However, the court also noted that

[W]hen an officer has arguable probable cause to arrest, he is entitled to qualified immunity both from Fourth Amendment claims for false arrest and from First Amendment claims stemming from the arrest.” *Gates v. Khokhar*, 884 F.3d 1290, 1298 (11th Cir. 2018).^{vi}

Thus, if the officer had at least arguable probable cause, Toole’s arrest would not constitute a violation of his rights under the First Amendment.

The court also observed that, viewing the facts as alleged by Toole, his activity of protesting and filming the police

were constitutionally protected under the First Amendment. Toole’s video shows that he was arrested after he zoomed his video in on an officer’s nametag and said that name out loud. This activity was a protected exercise of Toole’s rights under the First Amendment, and his arrest thwarted his ability to exercise those rights. As such, the court held that the officer violated Toole’s rights under the First Amendment.

The court then set out to determine if Toole’s First Amendment rights were “clearly established” such that every reasonable officer would have known that it was unlawful to thwart his exercise of those rights. If his rights were not clearly established, the officer is entitled to qualified immunity on this claim. If the rights were clearly established, the officer is not entitled to qualified immunity.

The court then examine the law related to this issue and stated:

This Court has established that individuals have “a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct” and that “[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.” *Smith*, 212 F.3d at 1333 (collecting cases). We’ve also held that individuals have a clearly established right to protest peacefully and “engage in expressive activities.” *Keating*, 598 F.3d at 761, 767 . . . It is also clearly established law in this Circuit that law enforcement officers cannot punish or retaliate against individuals for expressing their First Amendment rights. *Bennet v. Hendrix*, 423 F.3d 1247, 1255-56 (11th Cir. 2005) (collecting cases).^{vii}

Based upon the above, the court held that the law was clearly established. As such, the officer was not entitled to qualified immunity on the First Amendment claim.

Citations

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| i. No. 19-11729 (11th Cir. Decided December 26, 2019 Unpublished) | iv. Id. at 11-12 (emphasis added) |
| ii. Id. at 2-4 | v. Id. at 13 (emphasis added) |
| iii. Id. at 8-9 (emphasis added) | vi. Id. at 12 (emphasis added) |
| | vii. Id. at 14-15 (emphasis added) |

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This Issue . . .

Protestor Arrests and Qualified Immunity

