

THE LOCAL GOVERNMENT LIABILITY BEAT



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The First Amendment and Profanity Directed At Police

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On June 3, 2019, the Eighth Circuit Court of Appeals decided *Thurairajah v. City of Fort Smith*,ⁱ in which the court examined whether an officer violated the First and Fourth Amendments when he arrested a man that yelled profanity as he drove by an officer who was engaged in a traffic stop. The relevant facts of *Thurairajah*, taken directly from the case, are as follows:

In 2015, Trooper Cross was performing a routine traffic stop on a van pulled to the shoulder of a busy five-lane highway in Fort Smith, Arkansas. From 50 feet away, Trooper Cross heard Thurairajah, who was driving by, yell “f**k you!” out of his car window. The van’s occupants were a mother and her two young children. Thurairajah was driving at about 35 miles-per-hour on the far lane of the road moving in the opposite direction. Trooper Cross observed the two children in the van react to the yell. Trooper Cross ended the traffic stop of the van and pursued Thurairajah, stopped him, and arrested him, citing Arkansas’s disorderly conduct law. Trooper Cross believed the shout constituted “unreasonable or excessive noise” under the law. Ark. Code Ann. § 5-71-207(a)(2).²

Thurairajah spent several hours in jail but then was released and all charges against him were dropped.ⁱⁱ

Thurairajah subsequently filed suit in federal court and alleged that trooper violated his First Amendment rights to be free from retaliation and his Fourth



Amendment right to be free from an unreasonable seizure. The trooper filed a motion for qualified immunity from suit, and the district court denied the motion. The trooper appealed the denial of the motion to suppress to the Eighth Circuit Court of Appeals.

The court first noted that, for the plaintiff to defeat the trooper's motion for qualified immunity, he must satisfy both parts of a two-prong test. First, the plaintiff must show that the trooper violated his constitutional rights. Second, the plaintiff must show that the right was clearly established such that another reasonable law enforcement officer in the same situation would have known that the conduct violated the constitution.

Thurairajah's first allegation was that the trooper violated his Fourth Amendment rights when he arrested him for violating the Arkansas disorderly conduct statute that prohibits unreasonable noise.

The court first examined the law applicable to this issue and stated

A warrantless arrest is consistent with the Fourth Amendment if it is supported by probable cause, and an officer is entitled to qualified immunity if there is at least 'arguable probable cause.'" *Borgman v. Kedley*, 646 F.3d 518, 522-23 (8th Cir. 2011) (quoting *Walker v. City of Pine Bluff*, 414 F.3d 989, 992 (8th Cir. 2005)). An officer possesses probable cause to effectuate a warrantless arrest "when the totality of the circumstances at the time of the arrest 'are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense.'" *Id.* at 523 (quoting *Fisher v. Wal-Mart Stores, Inc. et al.*, 619 F.3d 811, 816 (8th Cir. 2010)). Arguable probable cause exists if Thurairajah's arrest "was based on an objectively reasonable—even if mistaken—belief that the arrest was based in probable cause." *Ulrich v. Pope Cty.*, 715 F.3d 1054, 1059 (8th Cir. 2013). Arguable probable cause provides law enforcement officers in a qualified immunity analysis "an even wider berth for mistaken judgments" than the probable cause standard affords a reasonable person. *Id.* Analyzing whether arguable probable cause exists "necessarily includes consideration of probable cause." *Id.* In other words, Trooper Cross is protected by qualified immunity if a reasonable officer in his shoes would have reasonably believed, even if mistaken, based on objective facts, that Thurairajah was violating the disorderly conduct statute's excessive noise prohibition by shouting the two-word insult from a moving vehicle with an unamplified human voice. ⁱⁱⁱ

Therefore, if the trooper had probable cause to arrest the plaintiff, the arrest did not violate the Fourth Amendment. Additionally, if the officer had "arguable probable cause," the trooper would still be entitled to qualified immunity.

In order to determine if the trooper had probable cause or arguable probable cause, the court looked at the statute. The court stated

The disorderly conduct statute reads: "A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm, he or she makes unreasonable or excessive noise." Ark. Code Ann. § 5-71-207(a)(2). Under the statute, the verbal content of Thurairajah's yell is irrelevant. See *id.* The statute does not penalize offensive speech, only unreasonable or excessive noise. *Id.* ^{iv}

The court then examined case law from the State of Arkansas to determine the probable cause issue. First, the court noted that Arkansas has no cases that have held that a two-word yell was a violation of the statute for which the plaintiff was arrested. The court observed that where shouting was part of the violation of the statute in this case, it involved shouting of an extended duration and the use of a sound amplifier. Additionally, the court noted that the Arkansas Court of Appeals has previously held that a 20 second incident of public shouting that did involve profanity did not violate the statute for which the plaintiff was arrested in Thurairajah's case.

The Eighth Circuit then held

Thurairajah's shout was unamplified and fleeting, no crowd gathered because of it, city traffic was not affected, no complaints were lodged by anyone in the community, business was not interrupted, nor were an officer's orders disobeyed. Thurairajah's conduct may have been offensive, but it was not an unreasonable or excessive noise. Trooper Cross lacked even arguable probable cause for an arrest and thus violated Thurairajah's Fourth Amendment right to be free from unreasonable seizure.

Thus, the court held that, since no probable cause or arguable probable cause existed for the arrest, the plaintiff satisfied the first prong of the qualified immunity test in that the trooper violated the Fourth Amendment.

The court then moved to the second prong, which was whether the law was clearly established such that another

reasonable law enforcement officer would have know this arrest violated the constitution. The court stated

Thurairajah’s Fourth Amendment right to be free from unreasonable seizure was clearly established at the time of his arrest. See *Pearson*, 555 U.S. at 232. “It was clearly established in 2013 ‘that a warrantless arrest, unsupported by probable cause, violates the Fourth Amendment.’” *Hoyland v. McMenemy*, 869 F.3d 644, 652 (8th Cir. 2017) (citing *Baribeau v. City of Minneapolis*, 596 F.3d 465, 478 (8th Cir. 2010) (per curiam)).^v

Since the court determined that the law was “clearly established,” the second prong of the qualified immunity analysis was satisfied. Therefore, the court affirmed the denial of qualified immunity for the trooper on the Fourth Amendment violation.

Thurairajah’s second allegation was that the trooper violated his First Amendment rights when he was arrested for shouting “F**k you” to the trooper as he drove past the traffic stop.

The court examined the elements that the plaintiff must satisfy for the First Amendment claim and stated

To prove a constitutional violation, Thurairajah must show that he was arrested in retaliation for a protected speech activity. See *Hartman v. Moore*, 547 U.S. 250, 256 (2006). This claim requires a four-part showing that

- (1) [Thurairajah] engaged in a protected activity;
- (2) [Trooper Cross] took adverse action against him that would chill a person of ordinary firmness from continuing in the activity;
- (3) the adverse action was motivated at least in part by [Thurairajah’s] exercise of the protected activity; and
- (4) lack of probable cause or arguable probable cause. *Hoyland v. McMenemy*, 869 F.3d 644, 655 (8th Cir. 2017).^{vi}

The court then applied the facts of Thurairajah’s case to each element. As to the first element, the court stated that the plaintiffs “profane shout was protected activity.”^{vii} Second, the court stated that an arrest is the type of government activity that would “chill a person of ordinary firmness” from engaging in such speech.^{viii} Third, the court stated that based on a reading of the trooper’s affidavit, the content of the shout motivated, in part, the arrest. Lastly, the court held there was no probable cause

or arguable probable cause for the arrest. As such, the court of appeals held that the trooper violated the First Amendment, thus, satisfying the first prong of the qualified immunity test.

The court then looked to the second prong, whether the law was clearly established. The court stated

Thurairajah’s First Amendment right to be free from retaliation was clearly established at the time of his arrest. “[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.” *Hartman*, 547 U.S. at 256. With limited exceptions not relevant here, even profanity is protected speech. See, e.g., *Cohen*, 403 U.S. at 25. Criticism of law enforcement officers, even with profanity, is protected speech. See *City of Houston, Texas v. Hill*, 482 U.S. 451, 461 (1987); *Hoyland*, 869 F.3d 644.^{ix}

Therefore, the court held that the law was clearly established, and the trooper is not entitled to qualified immunity on the First Amendment violation.

The Eighth Circuit thus affirmed the district court’s denial of qualified immunity.

Citations

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| i. No. 17-3419 (8th Cir. Decided June 3, 2019). | v. Id. at 6 (emphasis added). |
| ii. Id. at 2-3. | vi. Id. at 6-7 (emphasis added). |
| iii. Id. at 4 (emphasis added). | vii. Id. at 7. |
| iv. Id. | viii. Id. |
| | ix. Id. at 8 (emphasis added). |

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