UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ANGELA NELSON,	:	
Plaintiff,	:	
v.	:	File No. 2:03-CV-220
DEPUTY SHERIFF CHAD SCHMIDT and DEPUTY SHERIFF CHRIS LAUZON	:	
Defendants.	:	

OPINION AND ORDER

Plaintiff Angela Nelson ("Mrs. Nelson") filed this lawsuit pursuant to 42 U.S.C. § 1983, alleging that Deputy Sheriffs Chad Schmidt ("Deputy Schmidt") and Chris Lauzon[1] violated her constitutional rights while arresting her for disorderly conduct on August 12, 2000. Specifically, she raises claims of false arrest, malicious prosecution, excessive force[2] and violation of her First Amendment rights against Deputy Schmidt. She seeks compensation for damages resulting from her physical injuries sustained during the arrest, together with punitive damages, attorney's fees and

[1]Mrs. Nelson includes Deputy Lauzon in the excessive force claim. The three other claims only involve Deputy Schmidt.

[2]Mrs. Nelson also makes an excessive force claim. Defendants concede there is no basis for summary judgment on this claim.

costs. Deputy Schmidt moves for summary judgment (Doc. 17) regarding the false arrest, malicious prosecution and First Amendment claims. Mrs. Nelson opposes that motion (Doc. 20). For reasons stated below, Deputy Schmidt's Motion for Summary Judgment is **DENIED**.

Factual Background

Because this case is now before the Court on the Deputy Schmidt's motion for summary judgment, the following facts are undisputed or construed in the light most favorable to the plaintiffs.

On Saturday, August 12, 2000, Mrs. Nelson and her husband Gregg drove from their home in Queensbury, New York to Manchester, Vermont. They had dinner at Garlic John's restaurant where Gregg ordered two beers over the course of the meal. After dinner they began driving home on Route 30 North. Mr. Nelson drove and Mrs. Nelson was in the passenger seat.

At about 9:17 p.m., Bennington County Deputy Schmidt stopped Mr. Nelson on Route 30 in Manchester for suspicion of driving under the influence. Deputy Schmidt ordered Mr. Nelson out of the car for field sobriety tests after Mr. Nelson mentioned that he had a beer while at dinner. There was significant fog and Mrs. Nelson was unable to see where Deputy Schmidt and Gregg had gone, nor was she sure of what

was happening. Mrs. Nelson got out the car to obtain more information. Mrs. Nelson stated that her husband was not under the influence and "this is fucking ridiculous." Angela Nelson Dep. at 50 (Doc. 18, Ex. A). The deputy ordered Mrs. Nelson to get back in the car and she complied.

Mr. Nelson tested .085 on the preliminary breath test and was arrested for driving under the influence of alcohol. He was handcuffed and placed in the police cruiser. The officer seized a legal hunting knife from Mr. Nelson and placed it in the cruiser.

Deputies Schmidt and Lauzon told Mrs. Nelson she could not drive her car to the station to wait for her husband. They also told her she could not drive home to New York and she needed someone to come pick them up. Mrs. Nelson was never given any field sobriety tests or alcohol tests to determine whether she was under the influence of alcohol.

Mrs. Nelson made a phone call to find someone to drive her home. She then exited her vehicle to inform Deputy Schmidt she had found someone to pick them up. He told her to get back in the vehicle and she complied. She handed the phone to Deputy Lauzon and he gave the person on the other end directions to the Manchester Police Station.

Deputy Schmidt drove Mr. Nelson in custody to the Manchester Police Station. Deputy Gaboury drove Mrs. Nelson

to the station in the Nelsons' car. During the ride, Mrs. Nelson was calm. She told Deputy Gaboury she was going to file a complaint against Deputy Schmidt. Deputy Gaboury told her she was free to file a complaint.

At the station, Mr. Nelson's blood alcohol was measured at 0.66 on the Breathalyzer. Despite the fact that Mr. Nelson tested below the legal limit of .08, Deputy Schmidt issued a citation requiring him to appear in court to answer for the charge of driving under the influence of alcohol.

While Mr. Nelson was being processed at the station, Mrs. Nelson waited with Deputy Gaboury in the lobby. Their conversation "was rather calm and friendly." (Doc. 20, Ex. 10). Deputy Lauzon approached them and "spoke with her about her behavior at the scene." (Doc. 20, Ex. 9). Mrs. Nelson told him she was not a threat to anyone, that Deputy Schmidt had been rude, and that she intended to file a complaint. Deputy Lauzon went inside and Mrs. Nelson remained with Deputy Gaboury.

Mr. Nelson was released and joined his wife in the lobby. He remembered he had forgotten his hunting knife in the cruiser and he went back inside the police station to retrieve it. Deputy Schmidt went out to his cruiser in the parking lot to retrieve Mr. Nelson's knife. Near the back door of the police station, Deputy Schmidt noticed Mrs. Nelson walking

towards him.

Mrs. Nelson testified she wagged her finger at the deputy as she approached and said, "you're an asshole and I'm filing a complaint against you." Angela Nelson Dep. at 103 (Doc. 18, Ex. A). Deputy Schmidt then handed Mrs. Nelson the knife and she put it in her pocket. Mrs. Nelson turned and began to walk away, towards her husband. The entire incident took about 10-15 seconds (Doc. 20, Ex. 12).

Deputy Schmidt and Deputy Lauzon arrested Mrs. Nelson for disorderly conduct and resisting arrest. At that time, Mrs. Nelson was approaching her husband, just outside the entrance of the lobby.

Deputies Schmidt and Lauzon approached Mrs. Nelson from behind, grabbed her arms, twisted them behind her, and tackled her to the ground. Mrs. Nelson testified that "my arm felt like it was going to come out of my socket." Angela Nelson Dep. at 110 (Doc. 18, Ex. A). She also claims to have persisting injuries as a result of the arrest, including early arthritis in her back shoulder and sporadic pain in the middle of her back that makes reaching difficult.

The State's Attorney Office prosecuted Mrs. Nelson for disorderly conduct and resisting arrest in Vermont District Court. Mrs. Nelson was tried by a jury and found not guilty of disorderly conduct and resisting arrest.

Discussion

I. Legal Standard

Summary judgment is granted only if there is no genuine issue as to any material fact and the moving party has shown that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56©); see also N.Y. Stock Exch., Inc. v. N.Y., N.Y. Hotel LLC, 293 F.3d 550, 554 (2d Cir. 2002). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The moving party has the initial burden of coming forward with those parts of the record it feels demonstrate an absence of a genuine issue of material fact. Celotex Corp. v. Catrett , 477 U.S. 317, 323 (1986). The non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading" but must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

II. False Arrest

"A § 1983 claim for false arrest, resting on the Fourth Amendment right of an individual to be free from unreasonable seizures, including arrest without probable cause." Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996). To establish a claim for false arrest under 42 U.S.C. § 1983, a plaintiff must demonstrate that "'the defendant intentionally confined him without his consent and without justification.'" Escalera v.

Lunn, 361 F.3d 737, 743 (2d Cir. 2004) (quoting Weyant, 101 F.3d at 852). Deputy Schmidt argues that he had probable cause to arrest Plaintiff for disorderly conduct under 13 V.S.A. § 1026.

"Because probable cause to arrest constitutes justification, there can be no claim for false arrest where the arresting officer had probable cause to arrest the plaintiff." Id. (citation omitted). Probable cause exists when "the authorities have knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." Lennon v. Miller, 66 F.3d 416, 424 (2d Cir. 1995) (quotation marks and citation omitted). The acquittal of a plaintiff for a crime for which she was arrested does not mean that probable cause was lacking. See Krause v. Bennett, 887 F.2d 362, 370 (2d Cir. 1989). "Whether there was evidence to support a finding of probable cause depends on the totality of the circumstances and those facts available to the arresting officer at the time of the arrest." Weinstock v. Wilk, 296 F. Supp. 2d 241, 246 (D. Conn. 2003). "Probable cause exists when an officer has 'knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested.'" Curley v.

Village of Suffern, 268 F.3d 65, 69-70 (2d Cir. 2001) (quoting Martinez v. Simonetti, 202 F.3d 625, 634 (2d Cir. 2000)).

The offense of disorderly conduct in Vermont is defined in relevant part as follows:

> A person who, with intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof:
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> (3) in a public place uses abusive or obscene language . . .
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> Shall be imprisoned for not more than 60 days or fined not more than $500.00 or both.
> 13 V.S.A. § 1026 (1998).

The parties no doubt agree that Mrs. Nelson used obscene language. The contested issue is whether she did so with the intent to cause public inconvenience or whether her behavior recklessly created such a risk. This is a matter of clear dispute that ordinarily must be submitted to a jury.

A separate issue is whether Mrs. Nelson is collaterally estopped from asserting that Deputy Schmidt did not have probable cause to arrest her. The Court will briefly address whether the previous rulings by the Vermont District Court on probable cause collaterally estop the false arrest, malicious prosecution and First Amendment claims.

Collateral estoppel, or issue preclusion precludes the subsequent relitigation of an issue that was actually litigated and decided in a prior case between the parties, "so long as there was a final judgment on the merits and the issue was necessary to resolution of the action." Kent v. Katz, 312

F.3d 568, 574 (2d Cir. 2002) (citing Bull v. Pinkham Engineering Assocs., Inc., 170 Vt. 450, 461, 752 A.2d 26, 35 (2000)). The elements of issue preclusion are as follows:

> (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

Id. (citing Bull, 170 Vt. at 461, 752 A.2d at 35).

In the state criminal case, the Vermont District Court made findings of probable cause for the Information brought against Mrs. Nelson on September 11, 2000 (a Vt. R. Crim. P 5(c) finding of probable cause). Second, the Vermont District Court denied Mrs. Nelson's Motion for Redetermination of Probable Cause and Dismissal of the Disorderly Conduct charge on December 12, 2000. Third, on November 9, 2001, the Vermont District Court denied Mrs. Nelson's Motion to Suppress for Lack of Probable Cause.[3] Fourth, the District Court denied Mrs. Nelson's Motion for Judgment on Acquittal on July 2, 2002. The Vermont District Court ruled that the State had presented sufficient evidence on the charges of disorderly conduct and resisting arrest. Mrs. Nelson was acquitted of these charges.

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[3]The Motion to Suppress was denied as untimely.

Application of the collateral estoppel doctrine of a previous finding of probable cause in a criminal case to a subsequent § 1983 lawsuit for false arrest was addressed by the Second Circuit in Kent v. Katz, 312 F.3d 568 (2d Cir. 2002). The State in Kent substituted a negligent operation charge for that of DWI. In Kent, the Second Circuit did not apply the collateral estoppel doctrine because 1) the Vermont Judge's finding of probable cause on the Original Information was not a final judgment, but a threshold matter in order to permit the prosecution to proceed; 2) the final judgment in the criminal proceeding against Katz did not decide whether Katz had probable cause to arrest Kent for DWI; 3) a decision whether Katz had probable cause to arrest Kent on suspicion of DWI was necessary; 4) the issue of probable cause to arrest Kent was not actually litigated; 5) the state's substitution of the negligent operation charge for that of DWI provided that Kent no longer had any incentive to litigate in the criminal case the existence of probable cause to arrest him for DWI. Id. at 575-576. The Second Circuit held that the Vermont District Court's finding did not collaterally estop Kent from asserting a false arrest. Id.

This case is similar to Kent in several ways. First, the Vt. R. Crim. P. 5(c) finding of probable cause relied on the affidavit of Deputy Schmidt. Based on that affidavit, the

Vermont District Court found probable cause. In this case, however, the good faith of the officer who drafted the affidavit is at issue. Mrs. Nelson claims that Deputy Schmidt arrested her only because of her threat to make a complaint and to harass her. According to Mrs. Nelson, Deputy Schmidt did not have any information to support his assessment that she intended to cause a public inconvenience or whether her behavior recklessly created such a risk. Although a judge reviewing the affidavit in the initial stages of a criminal proceeding may give due deference to the officer regarding the reliability of the facts, the same may not be true in a § 1983 proceeding. "[I]f a police officer in his affidavit applying for an arrest warrant intentionally supplies the judicial authorities with untrue or deliberately misleading facts, the warrant, although facially valid, would lack probable cause." Lo Sacco v. City of Middletown, 745 F. Supp. 812, 816 (D. Conn. 1990). Consequently, the initial finding does not preclude a § 1983 action. The same is true regarding the Motion for Redetermination.

Finally, the decisions at the suppression hearing and at the close of the State's case in the criminal proceedings could have been based on evidence that was not available to Deputy Schmidt at the time of the arrest. Thus, these rulings address a very different issue than the question of whether Deputy Schmidt had probable cause to arrest Mrs. Nelson. The

issue of probable cause was never actually litigated in the Vermont District Court. Overall, it is clear that collateral estoppel does not apply.

III. Malicious Prosecution

To sustain a malicious prosecution claim under § 1983 in Vermont, "'[a] plaintiff must demonstrate that the defendant initiated the prosecution (1) without probable cause (2) with a malicious intent, and (3) the proceeding terminated in plaintiff's favor.'" Kent v. Katz, 146 F. Supp. 2d 450, 460-461 (D. Vt. 2001) (quotation marks and citation omitted). Deputy Schmidt disputes that Mrs. Nelson can demonstrate that he initiated the prosecution without probable cause and with malicious intent.

The Second Circuit has recognized that an officer can initiate prosecution.[4] "We find it well settled that in order for an individual to 'initiate' a prosecution for these purposes, '[t]he mere reporting of a crime to police and giving testimony are insufficient; it must be shown that defendant played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities

[4]When charges were added by the District Attorney's office, and not directly filed by the officer, the Second Circuit held that a jury could find that the officer "played a role in initiating the prosecution by preparing the alleged false confession and forwarding it to prosecutors." Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123, 130 (2d Cir. 1997).

to act.'" Rohman v. New York City Transit Authority, 215 F.3d 208, 217 (2d Cir. 2000) (quotation marks and citations omitted). "A defendant can be held liable for initiating a prosecution when he fails to provide material information to an investigation or a prosecution and that omission influences the decision to arrest and prosecute." Noga v. City of Schenectady Police Officers, 169 F. Supp. 2d 83, 90 (N.D.N.Y. 2001).

In this case, Deputy Schmidt prepared the citation which ordered Mrs. Nelson to appear in court, filed an affidavit which initiated prosecution and sent a Case Reaction Form to the State's Attorney setting forth the basis for prosecution. He was actively involved in initiating this suit. There are factual disputes regarding probable cause and Deputy Schmidt's alleged bad faith in arresting Mrs. Nelson. Moreover, a "lack of probable cause generally raises an inference of malice sufficient to withstand summary judgment." Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123, 131 (2d Cir. 1997). These are matters to be addressed by a jury, and summary judgment regarding the malicious prosecution claim is denied.

IV. First Amendment Retaliation

For a First Amendment retaliation claim, a plaintiff must demonstrate the following: (1) she has an interest protected by the First Amendment; (2) defendant's actions were motivated

or substantially caused by his exercise of that right; and (3) defendant's actions chilled the exercise of his First Amendment right. Curley, 268 F.3d 65 at 73 (citation omitted).[5] "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." City of Houston v. Hill, 482 U.S. 451, 461 (1989). Speech directed at police officers will be protected unless it will likely produce "a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." Kerman v. City of New York, 261 F.3d 229, 242 (2d Cir. 2001) (quotation marks and citation omitted).

The key issue under the First Amendment claim is whether Mrs. Nelson's conduct was likely to produce unrest or create public danger. Her statement that she intended to file a complaint, together with the various expletives, apparently was expressed in Deputy Schmidt's presence alone. Whether such a statement created a clear and present danger of a serious disruption is a matter best left to the wisdom of the jury.

Mrs. Nelson's conduct, including telling the officer that

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[5]The Second Circuit uses this standard, with the chill requirement for actions in which plaintiff alleges an arrest based upon speech directed at an officer. See Connell v. Signoracci, 153 F.3d 74 (2d Cir. 1998); Kerman v. City of New York, 261 F.3d 229 (2d Cir. 2001); Curley v. Village of Suffern, 268 F.3d 65 (2d Cir. 2001).

she was going to file a complaint against him and swearing, was protected by the First Amendment. Mrs. Nelson's right to criticize the police without reprisal clearly satisfies the first prong of this test. Mrs. Nelson's First Amendment right allows her to direct verbal criticism towards a police officer. Her conduct may have been unlikely to produce any unrest or create public danger.

As to the second element, if Deputy Schmidt had probable cause to arrest Mrs. Nelson, an inquiry into the underlying motive for the arrest need not be undertaken. Mozzochi v. Borden, 959 F.2d 1174, 1179-80 (2d Cir. 1992).[6] There is a factual dispute about the existence of probable cause, thus it is necessary for the Court to examine the underlying motive for arrest. Specific proof of improper motivation is required in order for plaintiff to survive summary judgment on a First Amendment retaliation claim. Blue v. Koren, 72 F.3d 1075, 1082-83 (2d Cir. 1995). "In the context of First Amendment retaliation, 'bare allegations of malice cannot overcome the qualified immunity defense.'" Kerman v. City of New York, 261 F.3d 229, 242 (2d Cir. 2001) (quoting Crawford El v. Britton, 523 U.S. 574, 588 (1998)).

The close proximity between a plaintiff's comments and a defendant's adverse actions against him or her could lead to

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[6]Qualified immunity protects an officer from a claim of retaliatory arrest where a reasonable officer would believe the arrest warrant was supported by probable cause. See Mozzochi, 959 F.2d at 1180.

an inference that the actions were motivated by plaintiff's protected speech. Cf. Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995) (noting that the temporal proximity between an inmate's lawsuit and the disciplinary action taken against him "may serve as circumstantial evidence of retaliation"); see also Webster v. City of New York, 333 F. Supp. 2d 184, 202 (S.D.N.Y. 2004). Evidence of improper motive may include circumstances suggesting that a plaintiff has been singled out or the unusual nature of the actions taken by an officer. Menon v. Frinton, 170 F. Supp. 2d 190, 196-197 (D. Conn. 2001).

In this case, the improper motivation can be shown by the close proximity between Mrs. Nelson's words, that is "you're an asshole and I'm filing a complaint against you" and her subsequent arrest for disorderly conduct by Deputy Schmidt. The protected action and subsequent arrest took place within minutes of each other. At the time she was arrested, Mrs. Nelson was walking back to her car. A reasonable fact-finder could infer that the actions were motivated by Mrs. Nelson's protected speech.

Finally, a plaintiff must show that her First Amendment rights were "actually chilled." Davis v. Vill. Park II Realty Co., 578 F.2d 461, 464 (2d Cir. 1978). The Supreme Court has held that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific

present objective harm or a threat of specific future harm." Laird v. Tatum, 408 U.S. 1, 14 (1972). Mrs. Nelson has raised a disputed issue of fact as to whether her First Amendment right was chilled.

V. Qualified Immunity

"The qualified immunity doctrine protects government officials from suits seeking to impose personal liability for money damages based on unsettled rights or on conduct that was not objectively unreasonable." Tenenbaum v. Williams, 193 F.3d 581, 595-96 (2d Cir. 1999) (internal quotation marks and citations omitted) (alteration in original). "Government officials are entitled to qualified immunity if (1) the conduct attributed to the official is not prohibited by federal law; (2) the plaintiff's right not to be subjected to such conduct by the defendant was not clearly established at the time of the conduct; or (3) the defendant's action was objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken." Rohman, 215 F.3d at 216. Officers of reasonable competence would have to disagree on the legality of the defendant's actions for the objective reasonableness test to be met. Id. "Even when there is no probable cause to arrest, a police officer is nonetheless immune from a claim of false arrest 'if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of

reasonable competence could disagree on whether the probable cause test was met.'" Posr v. Court Officer Shield No. 207, 180 F.3d 409, 416 (2d Cir. 1999) (quoting Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991)).

Mrs. Nelson has alleged Deputy Schmidt acted in bad faith when he chose to arrest her. She asserts that his intent was retaliatory, to stop her from filing a complaint, or at the very least, harass her for her conduct. Mrs. Nelson asserts that he did not have cause to believe that she intended to cause public inconvenience. In light of the Court's obligation to interpret evidence in the light most favorable to the nonmoving party, there is an open factual question as to whether Deputy Schmidt's arrest of Mrs. Nelson was reasonably based on probable cause. The matter should be left to the jury to decide, and the qualified immunity doctrine is therefore inapplicable.

Conclusion

For the reasons stated above, the Deputy Schmidt's Motion for Summary Judgment is **DENIED**.

Dated at Burlington, Vermont this 1st day of March, 2005.

/s/ William K. Sessions III
William K. Sessions III
Chief Judge, U.S. District Court