

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

NORMAN BROWN	:	TRIAL DIVISION-CIVIL
	:	
	:	
	:	MARCH TERM, 2010
V.	:	NO. 2973
	:	
	:	
KEVIN GORMAN	:	Superior Court Docket No.
	:	711 EDA 2011
	:	
	:	

OPINION

PROCEDURAL HISTORY

Plaintiff Norman Brown appeals from the March 2, 2011 Order granting a Motion for Summary Judgment in favor of Defendant Police Officer Kevin Gorman.

FACTUAL BACKGROUND

On July 19, 2009, at 1:45 a.m., Plaintiff Norman Brown (“Brown”) was standing with three companions on the 900 block of South Street in Philadelphia, while talking to a car full of people parked on the street. (Defendant’s Motion for Summary Judgment, ¶3; Deposition of Gorman, pgs. 23-24). It is undisputed that there were more than 20 people in the immediate area at that time. (Deposition of Brown, pg. 14). It is further undisputed that Defendant Police Officer Kevin Gorman (“Gorman”) and his fellow officers were concerned with a “flash mob” occurring in that area of South Street that night.

(Deposition of Gorman, pgs. 24-25). A flash mob occurs when a group of people gather suddenly in a public place. In the recent past, flash mobs have been associated with criminal activity causing injury to persons and property damage. South Street itself has had a history of flash mob activity. (Deposition of Gorman, pg. 24). As Gorman was patrolling the area to prevent a flash mob, he approached Brown and his companions and ordered them to move. *Id.* Although the number of times Brown refused to move is disputed, Gorman eventually approached Brown and told him to put his hands against the wall. (Deposition of Gorman, pg. 32). As Gorman was attempting to arrest Brown for failure to disperse, it is undisputed that Brown took off running. (Deposition of Gorman, pg. 34). He ran approximately three blocks before hiding behind a parked car. (Deposition of Gorman, pgs. 34-38).

Eventually, Gorman caught up to Brown and arrested him, charging him with failure to disperse in violation of Philadelphia County Ordinance § 10-1603(2). (Complaint ¶13). During the arrest, Brown was lying on the sidewalk on his stomach. According to Gorman, he put one hand in Brown's back and used his free hand to Grab Brown's left hand in order to handcuff him. (Deposition of Gorman, pg. 43). Brown was found not guilty of violating § 10-1603(2) on September 9, 2010. (Defendant's Amended Memorandum of Law In Support of Summary Judgment, pgs. 3-4).

On March 16, 2010, Brown brought this action against Gorman on claims of false imprisonment, assault and battery, malicious prosecution, and intentional infliction of emotional distress. (Complaint ¶1).

On December 31, 2010, Gorman filed his Motion for Summary Judgment. On January 3, 2011, Gorman filed an Amended Memorandum of Law In Support of

Summary Judgment. In the Amended Memorandum of Law, Gorman argued that he had probable cause to arrest Brown because Brown refused to disperse when ordered and resisted arrest by flight, and thus he did not commit false imprisonment or malicious prosecution. (Defendant's Amended Memorandum of Law In Support of Summary Judgment, pgs. 4-6). Gorman further argued that he did not commit assault and battery because he used only the force he believed necessary to arrest Brown, who had fled from Gorman after refusing to disperse. (Defendant's Amended Memorandum of Law In Support of Summary Judgment, pg. 9).

Brown filed his response to the Motion for Summary Judgment on February 2, 2011. In his response, Brown argued that he committed no criminal act and Gorman had no probable cause to arrest him. Therefore, it was argued that Gorman committed false imprisonment and malicious prosecution. (Memorandum of Law In Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, pg. 2). Brown further claims that Gorman committed assault and battery by twisting his shoulder as he handcuffed him. *Id.* Brown conceded that the claim for intentional infliction of emotional distress should be dismissed. *Id.*

This Court granted the Motion for Summary Judgment on all counts, dismissing the case on March 2, 2011. Brown filed his appeal from this Order on March 7, 2011 and filed his Statement of Matters pursuant to Pa.R.A.P. 1925(b) on March 31, 2011.

The issue on appeal is whether the lower court committed an error of law or abused its discretion in granting Gorman's Motion for Summary Judgment on all counts where the Court found that Gorman had probable cause in arresting Brown, and further found that Gorman did not use excessive force in the process of Brown's arrest.

LEGAL ANALYSIS

The standard for summary judgment motions is whether the trial court abused its discretion in granting the motion. *Weber v. Lancaster Newspapers, Inc.*, 2005 Pa. Super. 192, 878 A.2d 63, 71 (2005). The adverse party appealing the grant of summary judgment “bears a heavy burden” in persuading the appellate court to reverse. *Bartlett v. Bradford Publ’g Inc.*, 885 A.2d 562, 566 (Pa. Super. 2005).

Pennsylvania Rule of Civil Procedure 1035.2 states that Summary Judgment may be granted as follows:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for Summary Judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the Motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2.

When deciding a Motion for Summary Judgment, the moving party bears the initial burden of proving that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law based on the facts alleged. *Pennsylvania Gas and Water Co. v. Nenna Farin, Inc.*, 320 Pa. Super. 291, 298 (1983).

It is this Court’s position that Gorman has met his burden by showing that he had probable cause in arresting Brown for failure to disperse and resisting arrest by flight, thus Brown’s claims of false imprisonment and malicious prosecution must fail as a

matter of law. Additionally, this Court takes the position the facts as alleged did not support the claim of excessive force in the arrest of Brown. Accordingly, summary judgment was proper on all counts.

In determining whether probable cause exists, the totality of the circumstances must be considered. *Com. v. Banks*, 540 Pa. 453, 455, 658 A.2d 752, 752 (1995) (citing *Illinois v. Gates*, 462 U.S. 213, 214, 103 S. Ct. 2317, 2320, 76 L.Ed.2d 527 (1983)). Probable cause exists where “the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect had committed or is committing a crime.” *Com. v. Rodriguez*, 526 Pa. 268, 273, 585 A.2d 988, 990 (1991).

Even if the officer is mistaken, a finding that the arrest was a reasonable response to the particular situation is sufficient to establish probable cause. See *Com. v. Wright*, 867 A.2d 1265, 1268 (2005). To that point, “probable cause does not involve certainties, but rather ‘the factual and practical considerations of everyday life on which reasonable and prudent men act.’” *Com. v. Simmons*, 295 Pa. Super. 72, 83, 440 A.2d 1228, 1234 (1982). Moreover, an acquittal at a subsequent proceeding does not establish lack of probable cause at the time of arrest. *McGriff v. Vidovich*, 699 A.2d 797, 799 (Pa. Commw. Ct. 1997). It should also be noted that the existence of probable cause is typically a question of law for the Court rather than a question for the jury. *Kelley v. General Teamsters, Chauffeurs, and Helpers, Local Union 249*, 518 Pa. 517, 521, 544 A.2d 940, 941 (1988). Therefore, whether Gorman had probable cause to arrest Brown is

dependent upon whether Gorman had a reasonable suspicion that Brown had violated the failure to disperse ordinance.

It is a violation of the Philadelphia Code where:

three or more persons are engaged in a course of disorderly conduct in a public place of assembly, restaurant/entertainment districts or city permitted festivals or parades which causes or may reasonably be expected to cause substantial harm or serious inconvenience, annoyance or alarm and a police officer or other person authorized to enforce ordinances has ordered the participants and other persons in the immediate vicinity to disperse, no person shall refuse or knowingly fail to obey such an order.

Philadelphia Code § 10-1603(2).

Moreover, it is unlawful for a person to resist arrest by flight.

A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa.C.S.A. § 5104.

Based on the totality of the circumstances, this Court finds that probable cause to arrest Brown existed, and thus the arrest was lawful. The record shows that Brown was with three other people on the 900 block of South Street in Philadelphia at 1:45 a.m. when the incident occurred. The 900 block of South Street is a restaurant/entertainment district within the city with a history of flash mob activity. It is undisputed that the police were concerned with the possibility of flash mobs that night on South Street. While patrolling South Street, Gorman ordered Brown and his three companions, who were talking to a car full of people parked on the street and in close proximity to the large

group of people, to disperse from the area. With Brown's close proximity to the large group of people and the potential for flash mob activity, his conduct could reasonably be expected to cause substantial harm or serious inconvenience, annoyance or alarm. Although it is disputed how many times Gorman ordered Brown to disperse, Gorman eventually approached Brown and ordered him to get against the wall. As Gorman attempted to arrest Brown for failure to disperse, it is undisputed that Brown took off running down the street before he eventually stopped and was arrested three blocks away.

These facts and circumstances, namely Brown's refusal to move when ordered by Gorman and his close proximity to the large group of people with the potential for flash mob activity, are clearly sufficient to warrant a man of reasonable caution in the belief that Brown had violated the failure to disperse ordinance. Moreover, these facts also make it clear that Brown violated 18 Pa.C.S.A. § 5104 by running from Gorman when he attempted to make a lawful arrest of Brown for failure to disperse. The fact that Brown was subsequently found not guilty of violating the ordinance is irrelevant in proving that Gorman had probable cause. Accordingly, this Court finds that Gorman had probable cause to arrest Brown.

In finding that Gorman had probable cause to arrest Brown, it follows that Brown's false imprisonment and malicious prosecution claims must fail. To succeed in an action for malicious prosecution, the plaintiff must prove that the defendant instituted proceedings against the plaintiff: (1) without probable cause; (2) with malice and; (3) the proceedings must have terminated in favor of the plaintiff. *Kelley*, 518 Pa. at 520-21 (citing *Miller v. Pennsylvania R.R. Co.*, 371 Pa. 308, 313, 89 A.2d 809, 811 (1952)).

Here, Gorman had probable cause to arrest Brown. Accordingly, the malicious prosecution claim must fail.

False imprisonment requires: (1) the detention of another person, and; (2) the unlawfulness of such detention. *Renk v. City of Pittsburgh*, 537 Pa. 68, 76, 641 A.2d 289, 293 (1994). “An arrest based upon probable cause would be justified, regardless of whether the individual arrested was guilty or not.” *Id.* (citing *Fagan v. Pittsburgh Terminal Coal Corp.*, 299 Pa. 109, 116, 149 A. 159, 163 (1930)). Consequently, the Court’s finding that Gorman had probable cause to arrest Brown is fatal to his false imprisonment claim.

Additionally, Brown’s claims of assault and battery must also fail. “Assault is an intentional attempt by force to do an injury to the person of another, and a battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person.” *Butler v. Stockdale*, 19. Pa. Super. 98, 107 (1901). In the context of a police officer making a lawful arrest, that police officer “may use such force as is necessary under the circumstances to effectuate the arrest.” *Renk*, 537 Pa. at 76. Furthermore, 18 Pa.C.S.A. § 508 states:

- (a) PEACE OFFICER’S USE OF FORCE IN MAKING ARREST.--
 - (1) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to effect the arrest.

18 Pa.C.S.A. § 508.

As previously discussed, Gorman had probable cause to arrest Brown for failure to disperse and resisting arrest by flight. Therefore, the arrest was lawful and Gorman was entitled to use any force necessary under the circumstances to effectuate the arrest. After Brown ran for approximately three blocks, he eventually laid on the sidewalk on his stomach behind a parked car. After chasing Brown down, Gorman claims he placed one hand in Brown's back and grabbed Brown's left hand with his free hand and handcuffed him. This is more than reasonable under the circumstances.

CONCLUSION

For all the aforementioned reasons the Court did not commit an error of law or abuse its discretion in granting Gorman's Motion for Summary Judgment on all counts. Thus, the Court respectfully requests that the March 2, 2011 Order be affirmed.

BY THE COURT:

6/29/2011

Date

ALLAN L. TERESHKO, J.

cc:

Jonathan Joseph James, Esq/Michael Drossner, Esq., for Appellant
Matthew Kevin Hubbard, Eq., for Appellee