

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KEITH MASSIMINO
Plaintiff

VS.

MATTHEW BENOIT AND
FRANK LAONE
Defendants

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3:21-cv-01132 (RNC)

JULY 8, 2022

DEFENDANTS, MATTHEW BENOIT AND FRANK LAONE'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

Based upon the Plaintiff's Rule 56(a)1 Statement of Undisputed Facts and the Defendants' Rule 56(a)2 Statement of Undisputed Facts, and the Defendants' Rule 56(a)1 Statement of Undisputed Facts, (Doc. #40-1) submitted with the Defendants' Motion for Summary Judgment, Doc. #40), the following are the undisputed relevant and material facts before the Court upon which the parties' respective Motions for Summary Judgment are based:

I. **FACTS**

The scene of all the relevant action was 255 East Main Street in Waterbury, where the City's police station sits. The large brick building occupies an entire block, with the front entrance facing East Main Street, the two sides facing North Elm and Maple Streets and the rear of the building facing Water Street.

The police station is surrounded on all sides by sidewalks. On the evening at issue, there were no fences, shrubs, or any other obstructions interfering with a person's view of the

building from any of the streets or sidewalks surrounding the police department. There were also no signs on the exterior of the police station that recording was prohibited.

That night, October 30, 2018, Keith Massimino an admitted First Amendment Auditor was driving through Waterbury on his way home from his job as a videographer at the Met Life Stadium, for which he was given press or media credentials. Massimino has an interest in First Amendment auditing, a genre of videography in which a person records in a place where it is lawful to do so in order to gauge the response, if any, of public officials. A “successful” audit is one in which public officials do not react to or restrict the videography re You Tube channel. He became stuck in traffic on Interstate 84 and he decided to wait out traffic and film the exterior of the Waterbury Police Department. He parked his car about a half mile away from the station and walked toward it. He had two digital cameras and two tripods with him that day for work and he selected the smaller camera and tripod to use while filming the police department. Massimino left the larger video camera and tripod in his car along with his wallet and press credentials and approached the police station on East Main Street.

From the time that he arrived outside the police station until he was arrested, Massimino confined his activity to the sidewalks surrounding it and not once strayed into the street or into property on which he was not allowed to tread. He first recorded the front of the police station while walking down the East Main Street sidewalk reaching the corner of East Main and North Elm Streets after about a minute of recording. Two surveillance cameras were mounted on the exterior of the building at that corner and were visible from the

sidewalk. Massimino video recorded the surveillance cameras in the course of gathering footage.

Turning right and walking down the sidewalk on North Elm Street, Mr. Massimino continued filming the exterior of the building. Further down North Elm where it intersects Water Street, Massimino video recorded the police station's garage, including its combined entrance and exit on North Elm Street. The garage has minimal screening on its windows and a sort of gate on its entrance and exit, although the gate was open when Massimino was video recording from the sidewalk and the interior of the garage was plainly visible. He never entered the garage, but did video record gas pumps, marked, unmarked and undercover vehicles.

On his way down the North Elm Street sidewalk and back, Massimino also video recorded the entrance to the police department's Youth Division. The door to the Youth Division of the police department is visible from North Elm Street and is marked by a sign reading "Waterbury Police Department Youth Division." The windows of the Youth Division are darkened for privacy. At the time of the recording, the interior of the Youth Division was dark and nobody came or went from it. After finishing recording on North Elm Street, Massimino walked back around the corner to the front of the police station on East Main Street. Every image that Massimino recorded on the evening of October 30, 2018, including the building's front on East Main Street, the entrance to the Youth Division on North Elm Street, and the garage on North Elm Street could readily be viewed by anyone passing by.

Unbeknownst to Massimino, Defendant Matthew Benoit saw Massimino recording on North Elm Street when Benoit happened to look outside from the police station. Massimino

knew it was possible that police would approach him because he was video recording a police station. Benoit told Defendant Frank Laone about Massimino and then “drove around the building a couple of times” to see what Massimino was doing. Laone, meanwhile viewed the surveillance cameras on the police stations’ exterior from inside the police station and observed Massimino standing on the sidewalk and video recording.

Even though Massimino was simply strolling the sidewalk and recording what was plainly visible to anyone else passing by, the defendants believed that Mr. Massimino’s video recording of the police station’s garage, Youth Division exterior door, and exterior surveillance cameras was suspicious, and had safety concerns that Massimino could have been planning, “anything from criminal mischief up to an assault or homicide.” Laone stated that Massimino could have been contemplating a wide range of spectrum of crimes that he could have been committing including blowing up the building or engaging in shooting at the building and/or individuals.

After Massimino had been video recording for six (6) minutes and nine (9) seconds, the two defendants approached him on the East Main Street sidewalk. They were both in uniform with Laone emerging from the police station and Benoit stepping out of his car. Before speaking with Massimino, the defendants had just one basis for being suspicious of him, which was based upon the areas he was video recording, specifically the gas pumps, marked, unmarked undercover vehicles located in the garage, the surveillance cameras and the Youth Division offices. Laone and Benoit had prior knowledge regarding attacks on police officers and police properties, including one officer that was assassinated when pumping gas into his vehicle. Massimino was wearing a jacket and when initially approached

by the defendant officers, they did not know if Massimino had a weapon, but after confronting him, he had both hands on his camera which suggested he did not at that point appear to possess a weapon.

The defendants stood close to Massimino one on either side of him. Defendant Laone spoke first asking Massimino what he was “taping.” Massimino responded that he was a journalist and was “getting footage” and “just getting content for a story.” Laone asked “what kind of story,” and Massimino declined to reveal its contents, citing the fact that he was still working on it.

After Massimino stated he was a journalist, he was instructed to provide his press or media credentials and identification. Massimino was told that “we need ID,” and Laone immediately repeated “we need ID.” The total time of the parties’ conversation before the defendants ordered Massimino to produce ID was twenty (20) seconds.

Massimino asked why he would need to identify himself when he was engaged in a First Amendment protected activity. Benoit claimed that Massimino presented “a security issue,” because he was “videotaping a police station.” Laone asked Massimino, “how do we know you’re not planning on blowing up the building?” When Massimino assured the defendants that he had no ill will, Benoit told Massimino that “we don’t know that.”

Laone told Massimino that the defendants’ earlier demand that he identify himself was “a lawful order.” The total time of the conversation before the defendants told Massimino that their identification demand was “a lawful order” was fifty-six (56) seconds.

On the East Main Street sidewalk, Benoit told Massimino several times that he was “not allowed to videotape a police station,” but did not identify any statute rendering it illegal

to do so. Benoit never stopped him from videotaping including when he was placed under arrest. Laone agreed with Benoit's assertions that it was illegal to video record a police station. When Massimino asked the pair to "articulate a crime I've committed," Laone announced he had "reasonable suspicion," and did not need to identify a crime as he had reasonable suspicion to ask for identification.

Massimino was videotaping secure areas of the police station in plain view from the sidewalk such as the gas pumps, police marked, unmarked and undercover vehicles, surveillance cameras and the Youth Division office. Laone confirmed that Massimino was not free to leave, and when Massimino asked again what crime he committed, Laone responded that he had "reasonable suspicion."

Benoit again demanded that Massimino identify himself. Massimino declined and the defendants placed him under arrest for interfering with a police officer on the East Main Street sidewalk and ordered him to put his hands behind his back for arrest. The total time of the parties' interaction from its start to the defendants' arrest of Massimino and ordering Massimino to place his hands behind his back was two (2) minutes and nineteen (19) seconds.

Massimino was subsequently brought inside the police station and once he was inside he went through the formal booking process and he was charged with violating Conn. Gen. Stat. §53a-167a which prohibits interference with police.

The interference charge laid against Massimino by the defendants resulted in criminal case being initiated in the Connecticut Superior Court. Massimino retained two criminal defense lawyers. Although the Superior Court possessed the authority to modify the bail

commissioner-imposed conditions at his initial appearance or any time thereafter, Conn. R. Super. Ct. §38-13, it did not, and so Massimino was bound by them until the criminal case ended. His obligation to attend court was backed both by the possibility of his release being revoked and by the specter of a freestanding criminal charge for failure to appear. Conn. Gen. Stat. Ann. §53a-173(a).

The Superior Court held at least eighteen (18) hearings in the criminal case and Massimino attended all, but a few of them. Massimino's counsel filed a Motion to Dismiss the charges claiming a lack of probable cause for his arrest. On June 6, 2019 a Hearing on the Motion was held and Massimino was in attendance. After a full and fair opportunity to litigate his Motion, the Court, Schwartz, J. found that probable cause did exist for Massimino's arrest and denied his Motion to Dismiss. The prosecution of Massimino continued from June 6, 2019 until May 21, 2021 when the State entered nolle prosequi and thereafter Massimino's oral Motion to Dismiss was granted. Almost three (3) years later, on May 15, 2021, the Superior Court dismissed the lone charge against Massimino.

II. **ARGUMENT**

In Sections 2, 2.1, 2.2, 2.2.1, and 2.2.2 (Plaintiff's Memorandum of Law pp. 9-19), Massimino argues that his First Amendment rights were violated by the Defendant officers in preventing him from viewing and recording the Waterbury Police Station that was plainly visible to anyone standing on the adjacent sidewalk. Massimino relies heavily on Reed v. Town of Gilbert, 576 U.S. 155, makes the quantum leap to contend that the officer's actions constituted a content-based restriction because of the subject or the idea or message so

restricted. However, in City of Austin v. Reagan National Advert. of Austin, LLC, 142 S.Ct 1464 212 L.Ed.2d 418 2022 US LEXIS 2098 (2022) the Supreme Court clarified its decision in Reed to set forth a less restrictive definition of a content based restriction.

The defendant officers admit that videotaping non-sensitive areas of the police station which do not involve potential safety concerns could be constitutionally permissible. The restriction upon that right in this case was not Massimino's video recording of the exterior of the police station, but his filming of the gas tanks, marked, unmarked and undercover police vehicles, surveillance cameras and the Youth Division offices.

Massimino never stopped recording as evidenced by his Exhibit 1 when he recorded the entire interaction with the defendant officers until he was placed under arrest and even then the audio continued to record. Massimino was never told to stop recording at any time and when the defendant officers inquired as to what he was doing, he responded that he was a journalist getting content for an undisclosed story. When asked for his press or media credentials, Massimino refused after which the defendant officers' suspicions were further heightened and the officers then imposed a restriction on his continued videotaping of the police station.

The "restriction" upon his First Amendment rights which Massimino asserts occurred only after he claimed he was getting content for an undisclosed story, and then identified himself as a journalist, refusing to produce any press or media credentials or any other identification. Prior to that moment in time Massimino walked freely about the exterior of the police station recording with his camcorder.

As stated in City of Austin, “states were free to regulate the time, place and manner of solicitation generally in the interest of public safety, peace, comfort or convenience” (citing, Cantwell v. Connecticut, 310 U.S. 296, 306-07 60 S.Ct. 900 84 L.Ed. 1213) (emphasis added) In the present case, the defendants’ actions under color of state law was tantamount to the action of a state in enacting laws and regulations which to some degree limit an individual’s constitutional rights. In the present case it is undisputed that the defendant officers had legitimate safety and peace concerns given their knowledge of past events involving police officers and police property and Massimino’s claim that he was a journalist, who refused to provide his credentials.

In Austin, the Court rejected the proposition that “[a]ny examination of speech or expression inherently triggers heightened First Amendment concern.” “Rather, it is regulations that discriminate based on the ‘topic discussed or the idea or message expressed’ that are content based.” At 1474 (citing Reed 576 U.S. at 171)

The defendants’ “restrictions” were not discriminatory and were based upon legitimate public safety and peace concerns and, therefore, not content-based restrictions. The restriction placed upon Masimino was, therefore, content-neutral for which the intermediate scrutiny standard is applicable. “[T]o survive intermediate scrutiny, a restriction on speech or expression must be ‘narrowly tailored to serve a significant governmental interest’” City of Austin at 1475-76 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

It is undeniable that public safety and preservation of the peace are significant governmental interests for which the defendants in this case meet and exceeded the test for intermediate scrutiny.

Justice Breyer noted in his concurring opinion concerning a First Amendment analysis as follows: “I would ask a more basic First Amendment question: Does the regulation at issue wor[k] harm to First Amendment interests that is disproportionate in light of the regulatory objectives? I believe we should answer that question by examining ‘the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives and whether there are other less restrictive ways of doing so.’” City of Austin at 1478 (citing Reed at 179)

Applying Justice Breyer’s analysis to the facts of the present case would result in the conclusion that the defendants’ actions and restrictions upon Massimino’s First Amendment rights resulted in de minimis harm or restriction which lasted very briefly and was meant to achieve the objectives of protecting public safety.

The brief restriction imposed on Massimino is videotaping activities was content neutral and the defendants’ restriction was “narrowly tailored to serve the significant governmental interest of peace and public safety (City of Austin, at 1476) and, therefore, satisfies the test of intermediate scrutiny.

The First Amendment does not guarantee that right at all times and places or in any manner that may be desired as the government may permissibly restrict such rights depending in part upon the circumstances under which the restrictions occur. The test in this case is between an individual’s First Amendment right to view and record sensitive areas of a police station and the government’s interest in maintaining public safety and order. Kass v. City of New York, 864 F.3d 200, 207-208 2017 U.S. App. LEXIS 132 59 2017 WL 3122289 (2d. Cir. 2017); Zalaski v. City of Bridgeport Police Dept, 613 F.3d 336, 341 2010 U.S. App.

LEXIS 15307 (2d Cir. 2010); Heffron v. Int'l Soc'y for Krishna Consciousness Inc., 252 U.S. 640, 647 101 S.Ct. 2559 69 L.Ed.2d 298 (1981)

Although sidewalks are generally open to the public to engage in First Amendment activities, the government nonetheless certainly has a significant interest in keeping its public spaces and security issues, including potential security threats. Kass supra at 207-208.

Further for the defendants to avoid liability it was not necessary for them to refrain from interfering in Massimino's conduct until he actually committed an offense where his actions caused the defendant officers to reasonably believe a security issue existed. Kass, supra at 209.

The initial task of a Court faced with a dispute regarding First Amendment activity on government property is to define the nature of the property at issue. Zalaski supra at 341. In the present case, although Massimino asserts that he was at all relevant times on a public sidewalk, which is not disputed, the government property which was the subject of his videotaping was the Waterbury Police Department building and, therefore, the "property at issue" is the building not the sidewalk.

Although the government can enact content-based restrictions only if they are necessary to serve a compelling government interest, content neutral time, place and manner restrictions can be narrowly tailored to serve a significant governmental interest and must leave open ample alternative channels for the exercise of First Amendment rights. In determining whether the property owned or controlled by the government is a public forum, the Courts look to how the property is used and whether the property in question is part of a class of property which by history or tradition has been open and used for expressive activity.

Hotel Employees & Restaurant Employees Union Local 100 v. City of New York Dept. of Parks & Rec, 311 F.3d 534, 544 (2d. Cir. 2002). In Hotel Employees, the Court identified four factors relevant to the existence of a traditional public forum.

Applying the four part test enunciated in Hotel Employees, it is clear that the Waterbury Police Department building is not open to the public with the exception of a lobby area and was not a traditional public forum and the defendants' restriction upon Massimino did not violate any of his First Amendment rights.

The defendant officers' statement to Massimino that it was illegal for him to videotape the Waterbury Police Department building was based upon their reasonable suspicion about the manner and areas of the building he was videotaping and their reasonable suspicion that he might be intending to engage in some criminal activity. The defendant officers had legitimate public safety concerns and their request for his press or media credentials or identification was narrowly tailored to achieve a significant governmental interest, to wit, public safety and security issues. See Kass supra at 208. The defendant officers did not violate any of Massimino's First Amendment rights.

In Section 2.3 of his Memorandum of Law Massimino asserts that the Court need not resolve the issue of whether he was a journalist as he contends the distinction between journalists and non-journalists is immaterial to the decision of this Court. If that were the case, Massimino had no need to identify himself as a journalist, thus precipitating the defendants' request that he produce his credentials. Massimino argues that whether he was or was not a journalist, his First Amendment rights were identical. It was Massimino who decided to represent himself as a journalist rather than indicating to the police that he was

just a private citizen conducting a First Amendment audit or that he was simply videotaping what he claimed to be a public building.

It is undisputed that Massimino represented that he was a journalist getting content for an undisclosed story. It was not until after that disclosure and his refusal to produce his journalist credentials that he was told that he could not continue to videotape the police station because of the public safety and other concerns expressed to him by the defendant officers.

Massimino is correct that the Court need not make the determination as to whether he was or was not a journalist as Massimino has repeatedly admitted that fact. Massimino chose to make that representation and must now accept the effect of that admission upon the defendant officers, which lead to their reasonable suspicions being heightened.

In Section 3 and 3.1 of is Memorandum of Law (pp. 19-21) Massimino contends that when initially approached by the defendant officers and “surrounded him and demanded identification” he was “seized” and, therefore, his Fourth Amendment rights to be free from an unreasonable seizure were violated. However, the chronology of events as documented by Massimino himself in his video, Exhibit 1, clearly shows that he was initially approached, he was not asked for any identification until after he responded to Sergeant Laone’s initial inquiry. The video as well as the parties undisputed facts clearly indicate that when Laone inquired initially of Massimino as to what he was doing, Massimino responded that he was getting content for a story. Contrary to Massimino’s assertion, he was not “surrounded” by the defendant officers and “demanded to produce identification,” as no request for

identification occurred until after his representation that he was getting content for an undisclosed story.

Once Massimino identified himself as a journalist and refused to produce his press or media credentials or any identification, the defendants' previous reasonable suspicions were heightened. Given Massimino's unusual activities, the Defendant officers were justified in approaching him and inquiring about his conduct since they had reasonable suspicions that some criminal activity was possibly afoot and to conduct a valid Terry stop.

Massimino's continued refusal to produce identification following a valid Terry stop then lead to the defendant officers to conclude that probable cause existed to arrest Massimino for interference with a police officer.

In Section 3.2 of the Plaintiff's Memorandum of Law (pp. 21-22), Massimino claims his Fourth Amendment rights were violated by detaining him without reasonable articulable suspicion or stated simply an invalid Terry stop. The officers have presented in their Affidavits, submitted in support of their Motion for Summary Judgment, undisputed facts relating to their safety concerns when they approached Massimino. When Massimino represented that he was getting content for an undisclosed story he was asked for identification and the defendants initiated a valid Terry stop and had a legally valid basis to request identification, the refusal to do so constituted a violation of Conn. Gen. Stat. §53a-167a. The defendants would refer the Court to their Memorandum of Law in support of their Motion for Summary Judgment (Doc. #40-2) and specifically Section IV A & B as further support for their position in opposition to Massimino's contentions that the defendant officers

did not possess articulable objective facts upon which to believe Massimino might be intending to engage in criminal activity for which they conducted a valid Terry stop.

On page 22 of his Memorandum of Law, Massimino states that the defendants did not suspect that he was carrying any weapons, however, the testimony of the officers is that when they approached him he had both hands visible and did not have a visible weapon. In their Affidavits, the Defendant officers stated that since Massimino was wearing a jacket they did not know prior to approaching him if he possessed a concealed weapon. (See Laone & Benoit Affidavits ¶¶ 13 and 11, respectively)

In Section 3.2.1 of his Memorandum of Law Massimino asserts that it was impossible for the defendant officers to have had reasonable articulable suspicion of “Massimino committing a crime that does not exist in Connecticut law” (at pg. 22). Massimino asserts his argument based upon a false premise, to wit, that the defendant officers required reasonable articulable suspicion that he was committing or had committed a crime. Reasonable suspicion that a crime was in process or already committed is not what is required by Terry. The defendants would refer the Court to the defendants’ Memorandum of Law in Support of their Motion for Summary Judgment, Doc. #40-2 pp. 8-17 inclusive.

Simply, what is required for a lawful Terry stop is reasonable suspicion that a criminal activity may be afoot.

As the Second Circuit noted in United States v. Singletary, 798 F.3d 55 (2d. Cir. 2015), “[i]f officers had observed actual prohibited conduct they would have had probable cause to arrest. It is precisely because reasonable suspicion is based in something less than it approves only a brief investigatory stop” at 62.

The defendants had reasonable suspicion to investigate, which may or may not have led to an arrest. In the present case, the officers' valid Terry stop as part of their investigation required Massimino to provide identification, the refusal to do so resulted in a violation of Conn. Gen. Stat. §53a-167a.

In Section 3.2.2 of Massimino's Memorandum of Law (Doc. #38 pp. 24-28), he argues that "[a] person merely standing on a sidewalk filming a government building does not give rise to reasonable suspicion. . ." However, Massimino disregards essential undisputed facts upon which the defendant officers' reasonable suspicions were based. Massimino oversimplifies the issue to frame it to suggest the only reason the officers approached him was because he was innocently walking around the Waterbury Police Department building while video recording his observations.

The undisputed facts establish that the defendant officers were aware of prior attacks on police officers and police property, that they observed Massimino recording an enclosed garage area focusing on gas pumps, police marked, unmarked and undercover vehicles, surveillance cameras on the rooftop of the police department building and the Youth Division office. The defendant officers had concerns that Massimino was casing the police station in preparation for some potential criminal activity. The defendant officers did not know whether Massimino may have been planning to blow up the building or intending to engage in some form of criminal activity.

When Massimino responded that he was a journalist getting content for a story and refused to produce his press or media credentials or any other identification. the defendant

officers' suspicions were further heightened as such a refusal was not consistent with all their prior experiences with press or media individuals.

Despite Massimino's attempt to oversimplify and frame the issue in a very limited factual context, it is clear from all the undisputed facts, together with the reasonable inferences to be drawn from those facts, that the defendant officers had an objective basis upon which articulable reasonable suspicion existed to approach Massimino and conduct an investigation into his activities, including requesting identification.

In Section 4 – 4.2 inclusive of his Memorandum of Law (Doc. #38 pp. 28-31), Massimino again claims that the defendant officers did not possess reasonable articulable suspicion to detain him in the first place and lacked probable cause for his arrest, recognizing that his failure to prove an absence of probable cause is fatal to his malicious prosecution claim. Massimino argues instead, as he did in Section 3.2.1 of his Memorandum of Law that the defendant officers lacked reasonable articulable suspicions. The defendants have addressed that argument previously, however, Massimino does not dispute in the presence of reasonable suspicion, officers can, as part of their investigatory duty, lawfully request identification and the refusal to provide identification constitutes a violation of Conn. Gen. Stat. §53a-167a, Interfering with a Police Officer in the performance of his duties.

Noticeably, State v. Aloj, is absent from his argument that the defendant officers lacked probable cause. The plaintiff has presented no evidence to establish his burden to prove an absence of probable cause. Further, Massimino, although alleging that he attended numerous court appearances (Memorandum of Law pg. 18), omits the one appearance where the Court determined that probable cause existed for his arrest. (See defendants'

Memorandum of Law, Doc. #40-2, pp 17-24). Further Massimino omits one of the essential elements of a cause of action for malicious prosecution, i.e. malice. The defendants refer the Court to their Memorandum of Law in Support of their Motion for Summary Judgment, (Doc. #40-2 pp 25-26) as to the need for Massimino to present evidence of active malice by one or both of the defendant officers.

III. **CONCLUSION**

For all of the reasons set forth in this Memorandum of Opposition along with the defendants' Motion for Summary Judgment and Memorandum of Law in support thereof the defendants respectfully request that the Court deny the Plaintiff's Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on the above date a copy of the foregoing, was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

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