UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KEITH MASSIMINO Plaintiff	:	NO: 3:21-cv-01132 (RNC)
VS.	:	
MATTHEW BENOIT AND FRANK LAONE Defendants	:	JUNE 17, 2022

DEFENDANTS, MATTHEW BENOIT AND FRANK LAONE'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. PRELIMINARY STATEMENT

The Plaintiff, Keith Massimino, (hereinafter, "Massimino") instituted the present action against Waterbury Police Officers Matthew Benoit (hereinafter, "Benoit") and Frank Laone (hereinafter "Laone"), in their individual capacities for their alleged violation of his First and Fourth Amendment rights pursuant to Title 42 USC §1983. (Complaint, Doc. #1). While taking a video recording of the exterior of the Waterbury Police Department, Massimino was arrested and charged with misdemeanor interference in violation of Conn. Gen. Stat. §53a-167a(a). Massimino was required to attend proceedings in the Connecticut Superior Court and the prosecutor subsequently entered a nolle prosequi and thereafter his Motion to Dismiss the charges was granted.

Massimino alleges he had a First Amendment right to video record the exterior of the Waterbury Police Department, which he alleges to be a public building.

Approximately six and a half minutes into his filming, as he was standing on the sidewalk, he was approached by the Defendants, Benoit and Laone who requested that he

explain why he was filming. He responded that he was a journalist getting content for an undisclosed story. The Defendant officers requested that he produce identification and Massimino refused to identify himself in response to the request.

Massimino is a professional videographer and photojournalist primarily covering sporting events and has an interest in freedom of information and speech and considers himself a journalist. However, at no point did he show any identification or verification that he is in fact a "journalist." To the contrary he admits he refused to show any form of identification or otherwise identify himself.

Prior to approaching Massimino on the street both Defendants had observed him walking around the building, videotaping gas pumps located in a garage area that also housed marked, unmarked and undercover vehicles, surveillance cameras located on top of the building and the Youth Division office where juvenile arrestees are processed. Based upon their observations, the defendant officers believed that Massimino was "casing" the police station to possibly about to engage in some criminal activity as they were aware of past incidents involving attacks on police officers and police property.

As a result of the defendant officers' suspicions and Massimino's refusal to show identification, he was placed under arrest and charged with Interfering with an Officer in violation of Conn. Gen. Stat. §53a-167a and subsequently released on a Promise to Appear. Massimino retained counsel to represent him in the criminal proceeding during which his attorney filed a Motion to Dismiss the continuation of the prosecution alleging that the defendants arrested him without probable cause. However, after a full and fair hearing the Court found the defendant officers did in fact have probable cause for his arrest.

II. STANDARD OF REVIEW

Summary Judgment is appropriate under Federal Rule of Civil Procedure 56(c) when the moving party establishes that there is no genuine issue of material fact to be resolved at trial and that the moving party is entitled to a judgment as a matter of law. *See,* Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Materiality is determined by the substantive law that governs the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In this inquiry, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden of establishing that there is no genuine issue of material fact in dispute will be satisfied if he or she can point to an absence of evidence to support an essential claim of the non-moving party's claim. Celotex, 477 U.S. at 322-23. "A Defendant need not prove a negative when it moves for summary judgment on an issue that the Plaintiff must prove at trial. It need only point to an absence of proof on Plaintiff's part, and, at that point, Plaintiff must 'designate specific facts showing that there is a genuine issue for trial.'" Parker v. Sony Pictures Entm't, Inc., 260 F.3d 100, 111 (2d Cir. 2001) (quoting Celotex, 477 U.S. at 324; *see also* Gallo v. Prudential Residential Servs., 22 F. 3d 1219, 1223-24 (2d Cir. 1994) ("[T]he moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case."). The non-moving party, in order to defeat summary judgment, must then come forward with evidence that would be

sufficient to support a jury verdict in his or her favor. Anderson, 477 U.S. at 249 ("[T]here is not an issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party"). In making this determination, the Court draws all reasonable inferences in the light most favorable to the party opposing the motion. Matsushita, 475 U.S. at 587. However, a party opposing summary judgment "may not rest upon the mere allegations or denials of the adverse party's pleading," Fed. R. Civ. P. 56(e), and "some metaphysical doubt as to the material facts" is insufficient. *Id*. at 586 (citations omitted). On the other hand, "[i]f reasonable minds could differ as to the import of the evidence…and if there is any evidence in the record from any source from which a reasonable inference in the nonmoving party's favor may be drawn, the moving party simply cannot obtain summary judgment. R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 59 (2d Cir. 1997).

III. FACTS OF THE CASE

The Defendants' Local Rule 56(a)1 Statement of Undisputed Facts submitted pursuant to Local Rule 56(a)1 constitutes the facts of this case and is incorporated herein by reference.

IV. ARGUMENT

A. The Defendant Officers' Initial Questioning of Massimino did not Violate his First or Fourth Amendment Rights

The issue of whether a seizure and subsequent detention of an individual's person complies with the Fourth Amendment to the United States Constitution is governed by the standard set forth in Terry v. Ohio, 392 U.S. 1 (1968). Under Terry, if a law enforcement

officer can point to specific, articulable facts as the basis for a reasonable suspicion "that criminal activity may be afoot," he is justified in briefly detaining an individual to investigate. Terry, 392 U.S. at 30.

In general, the legality of such a stop is determined by a two-part test. First, courts examine "whether the officer's action was justified at its inception" and, next, they assess whether the officer's subsequent actions were "reasonably related in scope" to the circumstances that justified the stop. *Id.* at 19-20. The analysis under the first prong - whether the officer's action was justified at its inception – depends on the type of officer action at issue. If the initial action was of a type that invokes the protections of the Fourth Amendment, such as a seizure or a Terry stop[1], then the officer must be able to articulate a reasonable suspicion of criminal activity in order to justify his actions. *See*, United States v. Tehrani, 49 F.3d 54, 58 (2d Cir. 1995). Even so, the reasonable suspicion standard is far less exacting than what is required for probable cause. "The showing required to demonstrate 'reasonable suspicion' is considerably less than that which is necessary to prove probable cause." United States v. Rideau, 969 F.2d 1572, 1574 (5th Cir. 1992). In fact, "the Fourth Amendment requires only some minimal level of objective justification for the officer's actions, measured in light of the totality of the circumstances." *Id.* "The concept of reasonable suspicion, like probable cause, is not readily, or even usefully, reduced to a neat set of legal rules." United States v. Sokolow, 490 U.S. 1, 7 (1989) (internal quotations omitted). "Reasonable suspicion,

[1] A Terry stop is functionally equivalent to a seizure under the Fourth Amendment. Indeed, it can fairly be said that a Terry stop is the colloquial term for a Fourth Amendment seizure. *See*, United States v. Price, 599 F.2d 494, 498-99 (2d Cir. 1979) (treating question of when the Terry stop began and when defendant was seized as identical).

therefore, is an intermediate standard that cannot be precisely defined, but must be determined on a case-by-case basis taking into consideration the totality of circumstances." United States v. Moore, No. 03-CR-32E, 2006 U.S. Dist. LEXIS 9184, at *11 (W.D.N.Y. Feb. 24, 2006).

Nonetheless, certain types of police action can be undertaken even without a showing of reasonable suspicion. If, at its inception, an encounter between an officer and a citizen falls short of a seizure then the protections of the Fourth Amendment do not apply and reasonable suspicion is not needed to justify the police action. *See* United States v. Lee, 916 F.2d 814, 819 (2d Cir. 1990) ("Not every encounter between a police officer and an individual is a seizure implicating the Fourth Amendment's protections."). Thus, any type of police conduct that falls short of this threshold—that of seizing an individual or effectuating a Terry stop - is legally permissible even in the absence of reasonable suspicion. *See*, United States v. Lopez, 432 F. Supp .3d 99, 113 (D. Conn. Jan. 10, 2020) (officer driving by defendant's car and shining spotlight inside "was not unlawful" as "the police are entitled to conduct further investigation even in the absence of reasonable suspicion").

Many types of police conduct, including some at issue here, have been classified as less than a seizure. For instance, "a police officer is free to approach a person in public and ask a few questions; such conduct, without more, does not constitute a seizure." Lee, 916 F.2d at 819; *see also*, Florida v. Bostick, 501 U.S. 429, 434 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions.")

Here, the encounter between Sergeants Benoit and Laone and Massimino began when they approached Massimino on the sidewalk outside the Waterbury Police Department

and inquired as to why Massimino was videotaping the Waterbury Police Department building. This is precisely the type of "further investigation even in the absence of reasonable suspicion" that officers are authorized to undertake and indeed, expected, to pursue. Lopez, 432 F. Supp. 3d at 113. As such, there are no Constitutional limitations placed on this type of police conduct. *See, e.g.*, State v. Courchesne, 296 Conn. 622, 649 (2010) (officer action that included blocking in defendant's car with police car, approaching defendant and communicating with defendant found to be constitutionally permissible) (remanded on other grounds). None of these initial actions rises to the level of a seizure. Therefore, the initial interaction between Officers Benoit and Laone and Massimino was "justified at its inception," as the first prong of the two-part Terry test demands.

Moving on to the second prong of the Terry test - the legality of the officer's subsequent actions - the first question that must be addressed is when the seizure or Terry stop occurred.

"When considering the validity of a … stop, our threshold inquiry is twofold. First, we must determine at what point, if any . . . the encounter between [the police officer] and the defendant constitute[d] an investigatory stop or seizure. . . . Next, [i]f we conclude that there was such a seizure, we must then determine whether [the police officers] possessed a reasonable and articulable suspicion at the time the seizure occurred. "State v. Courchesne, 296 Conn. 622, 642-643 (2010) (quoting State v. Santos, 267 Conn. 495, 503 (2004)) (internal quotation marks omitted); *see also*, Lopez, 432 F. Supp. 3d at 109 ("The first step… is determining when the encounter between the officers and [the defendant] became a Terry stop.").

"A seizure requires either physical force . . . or, where that is absent, submission to the assertion of authority." Lopez, 432 F. Supp. 3d at 110 (quoting United States v. Swindle, 407 F.3d 562, 572 (2d Cir. 2005) (internal quotations omitted)). It has been held that "to comply with an order to stop - and thus to become seized - a suspect must do more than halt temporarily; he must submit to police authority, for 'there is no seizure without actual submission.'" United States v. Baldwin, 496 F.3d 215, 218 (2d Cir. 2007) (quoting Brendlin v. California, 551 U.S. 249, (2007)). "We have . . . defined a person as seized under our state constitution when by means of physical force or a show of authority, his freedom of movement is restrained." State v. Santos, 267 Conn. 495, 503 (2004) (quoting State v. James, 237 Conn. 390, 404 (1996)).

Here, Plaintiff was not initially seized, for purposes of the Fourth Amendment, when Benoit and Laone approached him and inquired as to the reason for videotaping the police department building. The videotape shows clearly that Massimino did not submit to police authority, that the officers showed any physical force or that Massimino attempted to leave and was in some way restrained. Baldwin, 496 F.3d at 218: Swindle, 407 F.3d at 572.

Even assuming a conclusion that Massimino was seized, Terry provides that investigative detentions are justified where predicated upon a reasonable suspicion of criminal activity. Terry, 392 U.S. at 30. However, even an investigative detention that is adequately supported by reasonable suspicion "must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Gilles v. Repicky, 511 F.3d 239, 245 (2d Cir.

2007) (quoting Florida v. Royer, 460 U.S. 491, 500 (1983). Here, plaintiff's detention conforms with Terry and its progeny by virtue of being rooted in reasonable suspicion and appropriately tailored in scope and duration. As discussed above, the officers had a reasonable suspicion that the Plaintiff might be intending to engage in an activity that could be dangerous to the officers and the public. As the officers stated in the video, the plaintiff could be videotaping the police department building to later blow up the building or engage in a shooting, having previously observed him walking around the police station and recording gas pumps, marked and unmarked and undercover vehicles, surveillance cameras and the exterior of the Youth Division office.

At that time the defendant officers were justified in requesting Massimino to produce identification. State v. Aloi, 280 Conn. 824, 834 911 A.2d 1086, 1093 (2007). Once the plaintiff refused to show any identification or verify his credentials as a journalist the officers' suspicions were heightened. Furthermore, the detention was temporary – spanning only a few minutes - and lasted no longer than was necessary. United States v. Tehrani, 49 F.3d 54, 57 (2d Cir. 1995) (holding that thirty minute detention in an airport security office was lawful because police diligently sought to confirm the defendant's identity during this time).

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct 1868 20 L.Ed.2d 899, the Supreme Court was confronted with the serious question of the role of the Fourth Amendment in the confrontation on the street between a citizen and a police officer investigating suspicious circumstances. Terry at 4. The Court held that, "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that ***criminal activity may be afoot,***" (emphasis added) a police officer may in appropriate circumstances and in an

appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause at the point to make an arrest.

The facts in Terry upon which the Court held the police officer had reasonable suspicion to approach the defendant Terry and conduct an investigation are not dissimilar to the facts in the present case. Although the Court focused primarily on the issue of the search of Terry's person for which weapons were found, the officer's legal authority to initially approach Terry in order to conduct his investigation was found to exist.

Officer McFadden, the officer who initially approached Terry, had been patrolling in plain clothes in downtown Cleveland at approximately 2:30 p.m. on October 31, when his attention was distracted by two men, Chilton and Terry, who were standing on the corner of Huron Road and Euclid Avenue. Officer McFadden had never seen the two men before.

McFadden was a policeman for 39 years and a detective for 35 years and had been assigned to patrol that vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years and had developed routine habits of observations. McFadden also testified in Terry's trial that "they didn't look right to me at the time." He observed them repeatedly walking short distances, turning back, peering in a store window and suspected they were "casing a job, a stick up" and considered it his duty to investigate further and approached the two men and asked for their names. Terry at 5-7.

In the present case, the defendants did not know or have reason to know Massimino's identity. They observed him videotaping sensitive areas of the police station including the garage area, where gas pumps were located together with marked, unmarked and undercover police vehicles, the surveillance cameras located on the top of the building and

the Youth Division entrance and exit where juvenile offenders are processed. In addition, if press or media personnel were to record any footage they would have first checked in at the front desk to give prior notice of their intended actions.

Both defendant officers were familiar with prior incidents of attacks on police officers and police facilities and found Massimino's actions highly suspicious.

Terry does not require, as the plaintiff contends that the defendant officers had to have reasonable suspicion that a crime was being committed or was committed. (See Exhibit A – Complaint Exhibit 1, Massimino Video) In fact, Terry had not committed any crime or was he committing any crime by walking back and forth on a public street and looking into a store window, yet Officer McFadden's reasonable suspicion that they were "casing a job" based on his observations and experience led him to reasonably conclude the "criminal activity may be afoot."

The Court in Terry specifically stated that government and, therefore, the police have a general interest in crime prevention and detection and it is that interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner, approach a person for purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest. Terry at 22-23.

Interestingly, the Court in Terry took notice of the statistics regarding the number of law enforcement officers killed and injured by criminals in 1966, the year of Terry's arrest. Terry at 25. Footnote 21, a further indication of the reasonableness of a police officer's concern for safety, as was the case with the defendants, Laone and Benoit.

The Court further commented that given McFadden's years of experience as a police officer and crime detective that it would have been poor police work to have failed to investigate the observed behavior of Terry and his accomplice. Terry at 23.

Further as Justice Harlan noted in his concurring opinion, McFadden was warranted in forcing an encounter with Terry "in an effort to ***prevent*** or investigate a crime." Terry at 34 (emphasis added).

In United States v. Gonzalez, the New York Southern District Court later elaborated on searches motivated by reasonable suspicion in a similar circumstance to Terry. (In Terry the two individuals were pacing in front of the store, peering into the windows and conferring. Terry, 392 U.S. AT 5-6, 28-30.) In Gonzalez, a Honda Accord drove slowly past a store and parked on the opposite side of the street a few spaces past the entrance. United States v. Gonzalez, 2009 U.S. Dist. LEXIS 59742, 3 (S.D.N.Y., Mar. 2, 2009). In combination with Gonzalez peering into the detective's vehicle and swiftly moving away from the Accord and the store, he appeared to be "casing" in preparation of a crime, which led to greater suspicion. Id. at 15-16. Further the Court stated that "while the activity that the police observed could have been consistent with innocent behavior, it was also consistent with 'casing.'" Id. at 15.

In United States v. Manuel, police officers had reasonable suspicion that Manuel was in violation of an open container law after seeing him drink from a cup around 3:30 a.m., and slouching. United States v. Manuel, 647 Fed.App'x. 11, 12 (2d Cir. 2016). The court held, "to be sure, a standard beer can is similar in size to a soft drink can but the law 'does not demand that all possible innocent explanations be eliminated before conduct can be

considered as part of the totality of circumstances supporting a reasonable basis to believe that criminal activity may be afoot.'" Id. at 12-2. (Quoting United States v. Bailey, 743 F.3d 322, 333 (2d Cir. 2014).

In viewing the totality of the circumstances that may "[indicate] possible illicit activity, [an officer must be] properly informed by 'commonsense judgment and inferences about human behavior.'" United States v. Singletary, 798 F.3d 55, 60 (2d Cir. 2015) (quoting Illinois v. Wardlow, 528 U.S. at 125).

In United States v. Padilla, 548 F.3d 179 (2008), the court upheld a finding of reasonable suspicion to conduct a Terry stop where no crime was or had occurred, but the officer believed a robbery might take place. The Court noted that under Terry, a police officer may briefly detain an individual for questioning if the officer has a reasonable suspicion that the individual has been or is about to be engaged in criminal activity or some indication of possible illicit activity. Id. at 186-187.

In United States v. Singletary, 798 F.3d 55 (2015) noted that "[i]n Terry v. Ohio, the Supreme Court 'expressly recognized that government interests in 'effective crime prevention and detection,' as well as in officer and public safety while pursuing criminal investigations, could make it constitutionally reasonable 'in appropriate circumstances and in an appropriate manner' temporarily to detain a person' to investigate possible criminality even in the absence of a warrant or probable cause for arrest" Id. at 59.

The Court further noted in Singletary that reasonable suspicion demands "specific and articulable facts, which taken together with rational inferences from those facts provide detaining officers with a 'particularized and objective basis for suspecting legal wrongdoing.'"

(Citing United States v. Arvizu, 534 U.S. 266, 273 122 S.Ct 744, 151 L.Ed.2d 740 (2002)) The Court noted however, that this standard requires more than a "hunch" which the Court defined as an 'inchoate and unparticularized suspicion or a conclusion derived from intuition in the absence of articulable, object facts' at 60 (citing Illinois v. Wardlow, 528 U.S. at 124, (quoting Terry v. Ohio, 392 at 27)) "[T]he law 'does not demand all possible innocent explanations be re-eliminated before conduct can be considered as part of the totality of circumstances supporting a reasonable basis to believe that criminal activity may be afoot.'" at 60 (citing United States v. Barley, 743 F.3d at 333; See Navarette v. California, 134 S.Ct at 1691) "Nor does reasonable suspicion demand actual observation of a person engaged in prohibited conduct. This is evident from precedent recognizing that reasonable suspicion can arise even where a defendant's conduct is consistent with innocence as with guilt, so long as there is 'some indication of possible illicit activity'" (citing United States v. Padilla, 548 F.3d at 187) "Indeed, if 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 that it approves only a brief investigating stop" at 62.

In addition, an officer is entitled to draw on his experience and specialized training to make inferences from and deductions about the cumulative information available to him that might well elude an untrained person. Courts evaluate the circumstances surrounding the stop "through the eyes of a reasonable and cautious police officer on the scene guided by his experience and training." United States v. Padilla, at 187 (citing Bayless, 201 F.3d at 133) (Quoting United States v. Oates, 560 F.2d 45, 61 (2d Cir. 1977).

An indication of possible illicit activity is properly informed by "commonsense judgment and inference about human behavior." Singletary at 6 (citing Illinois v. Wardlow, 528 U.S. 199, 125 120 S.Ct 673 145 L.Ed.2d 570 (2000))

B. The Defendants Laone and Benoit had Articulable Objective Facts Upon Which to Believe Massimino Might be Intending to Engage in Criminal Activity

The undisputed facts are that Laone and Benoit, both Sergeants with the Waterbury Police Department with 17 and 14 years of police experience respectively, observed Massimino as he was walking around the police department building while filming with his camcorder. Massimino was observed by both defendants to be videotaping gas pumps in an enclosed garage area, which also housed marked, unmarked and undercover vehicles, surveillance cameras located on the rooftop area of the police station and the Youth Division where juvenile offenders are processed after arrest. Massimino wore a jacket under which he may have possessed a concealed weapon. Both Defendants were keenly aware of a number of prior assassinations and attacks on police officers and police properties. The Defendant officers' observations lead them to suspect Massimino was casing the police department building to possibly engage in some form of criminal activity. Additionally, in the experience of both Defendants, they had never observed any media or press individuals filming the police department without first checking in with the front desk officer to disclose their intentions to film from outside the police department building.

Sergeant Laone, as the on duty desk sergeant, was responsible for the safety of the building, its civilians and civilian employees. Massimino admits he was filming for approximately 6:40 minutes before the Defendant officers approached him. When asked

what he was doing he replied that he was a journalist and was getting content for a story about which he would not disclose. Massimino never disclosed to the defendant officers that he was conducting a so-called First Amendment Audit.

Massimino was asked to show his press or media identification or credentials, which he refused, steadfastly, maintaining that he was under no obligation to do so. Despite repeated requests for identification, Massimino continued to refuse to comply with the Defendant officers' requests. As a result of Massimino's refusal to produce identification to comply with the Defendant officers' investigation into what they reasonably believed were suspicious activities and circumstances, Massimino was charged with Interfering with a Peace Officer in violation of Conn. Gen. Stat. §53a-167a and placed under arrest.

Based upon the Defendant officers' training and experience of nearly two decades on the job, their direct observations of Massimino's conduct, their knowledge of prior attacks on police officers and their concern for their safety as well as the safety of the public, they sought to obtain from Massimino the reason for his action in videotaping the police department building including potentially sensitive areas.

The defendant officers had specific and articulable facts, which taken together with rational inferences from those facts, commonsense judgments, their experience and training, and inferences about human behavior, provided a reasonable and legal basis to approach Massimino to investigate further to substantiate or refute their concerns.

When Massimino told them he was a journalist and refused to produce any press or medial credentials, their suspicions were further heightened. Massimino's continued refusal to produce identification was a hindrance and interference in the Defendant officers' attempt

to perform their investigatory duties at which point probable cause existed to arrest Massimino pursuant to Conn. Gen. Stat. §53a-167a. See State v. Aloi, 280 Conn. 824 (2007).

C. Massimino is Collaterally Estopped From Claiming an Absence Of Probable Cause

After his arrest, Massimino went through the booking process and was later released on a Promise to Appear. He retained the services of an attorney who on his behalf filed a Motion to Dismiss in connection with the criminal charges. A hearing was held before Superior Court Judge Joseph Schwartz on June 6, 2019. Massimino claimed, *inter alia*, that his case should be dismissed because the Defendant officers lacked probable cause for his arrest. After hearing arguments from Massimino's counsel and the State, Judge Schwartz denied the Motion to Dismiss and specifically found the Defendant officers in fact had probable cause to arrest Massimino for Interfering with a police officer in that he hindered and interfered with the officers' investigatory duties.

Subsequent to the denial of the Motion to Dismiss the criminal case proceeded until May 21, 2021 when the State entered a nolle followed by a dismissal of the charges.

"**Collateral estoppel** or issue preclusion, prevents parties or their privies from relitigating in a subsequent action of fact or law that was fully and fairly litigation in a Marvel Characters, Inc. v. Simon, 310 F. 3d 280, 288 (2d Cir. 2002). It may be applied non-mutually; third parties may raise **collateral estoppel** defensively against a party who had fully and fairly litigated an issue to prevent that party from raising the same issue in a subsequent lawsuit. See ACLI gov't Secs. V. Rhoades, 963 F.2d 530, 533 (2d Cir. 1992) (citing Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326-31 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (noting

that "doctrine of mutuality, at least for defensive use of **collateral estoppel**, no longer applies.")). For the doctrine to apply, a party must show that "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." Marvel Characters, Inc. v. Simon, 310 F.3d at 288-289.

In Barton v Undercover Officer, 671 Fed. App'x 4, 2016 U.S. App. LEXIS 21743, 211 6 WL 7131861 (2d Cir. 2016) the Court of Appeals held that in a prior lawsuit, the plaintiff Burton had litigated the issue of whether there was probable cause for his arrest. In the prior proceeding the District Court determined there was probable cause for two of the five charges levied against Burton. As to those two charges for which probable cause was found to exist, Burton's malicious prosecution action was dismissed.

Probable cause is a complete defense to a claim for malicious prosecution, Burton at 5. The identical issue of probable cause was litigated and decided in Massimino's criminal case following a full and fair opportunity to litigate that issue. (See Criminal Transcript pages 1 through 34) Since probable cause was found to exist for Massimino's arrest in the prior proceeding, he is collaterally estopped from again attempting to litigate that same issue in the present case. As a result, since probable cause has been found to exist, both his claims as to his arrest and malicious prosecution under 42 U.S. §1983 are barred and the Defendants' Motion for Summary Judgment should be granted.

D. Massimino Has Failed to Produce Admissible Evidence to Prove an Absence of Probable Cause for his Arrest and for his Claimed Malicious Prosecution Pursuant to §1983 as Probable Cause Existed for His Arrest and Prosecution

Alternatively, should the Court not apply the collateral estoppel doctrine, the Defendants submit that the undisputed facts substantiate that the defendant officers had probable cause to arrest Massimino.

The Plaintiff's failure to prove an absence of probable cause is fatal to both his claims for his arrest and malicious prosecution pursuant to his Fourth Amendment Rights. Massimino's Fourth Amendment claim is based upon the alleged absence of probable cause. (Complaint, Doc. #1, Counts 2 and 3)

The elements of malicious prosecution are well established and are identical under both Federal and Connecticut law holding that a plaintiff must prove among other elements the absence of probable cause to arrest did not exist. Raysor v. Port Authority of New York and New Jersey, 768 F.2d 34, 39 (2d Cir. 1985), cert. denied, 475 U.S. 1027, 89 L. Ed. 2d 337, 106 S. Ct. 1227 (1986). Walczyk v. Rio, 496 F.3d 139, 156 (2d Cir. 2007) (internal quotation marks omitted).

"An action for malicious prosecution requires a Plaintiff to prove that: (1) the Defendant initiated or procured the institution of criminal proceedings against the Plaintiff; (2) the criminal proceedings have terminated in favor of the Plaintiff; (3) the Defendant acted without probable cause; and the Defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice." McHale v. W.B.S. Corp., supra 187 Conn. App. 447, 446 A.2d 815; see also 52 Am.Jur.2d 145, Malicious Prosecution §8 (2000); D. Wright, J.

Fitzgerald & W. Ankerman, Connecticut Law of Torts (3d Ed. 1991) §161, p. 430. The Connecticut Supreme Court has described these elements of the tort as the "'stringent requirements'...." Gallo v. Barile, 284 Conn. 459, 475, 935 A.2d 103 (2007); 52 Am. Jur. 2d 143, supra Sec at 5 ("Actions for malicious prosecution are not favored by the courts. Thus, a malicious prosecution action is subject to limitations that are more stringent than those surrounding other kinds of actions, and recovery is allowed only if the requirements have been fully complied with.") Bhatia v. Debek, 287 Conn. 397, 404 (2008); Giannamore v. Schevchuk, 108 Conn. App. 303, 310 (2008).

The third element of a claim for malicious prosecution is lack of probable cause. McHale v. W.B.S. Corp., supra 187 Conn. App. 447, 446 A.2d 815.

"The existence of probable cause is an absolute protection against an action for malicious prosecution, and what facts, and whether particular facts, constitute probable cause is always a question of law." (Internal quotation marks omitted.) Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP, supra 281 Conn. App. 94, 912 A.2d 1019; Mulligan v. Rioux, 229 Conn. 716, 739, 643 A.2d 1226 (1994), on appeal after remand, 38 Conn. App. 546, 662 A.2d 153 (1995). It is well established in our jurisprudence that "[t]he existence of probable cause is an absolute protection against an action for malicious prosecution...." (Internal quotation marks omitted.) Vandersluis v. Weil, 176 Conn. 353, 356, 407 A.2d 982 (1978); Hebrew Home & Hospital v. Brewer, 92 Conn. App. 762, 767, 886 A.2d 1248 (2005).

"[P]robable cause is a fluid concept ... not readily, or even usefully, reduced to a neat set of legal rules.... While probable cause requires more than a 'mere suspicion' of wrongdoing, its focus is on 'probabilities,' not 'hard certainties'...." *Id.* (internal citations and

quotation marks omitted). "In assessing probabilities, a judicial officer must look to the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* (internal quotation marks omitted). In sum, probable cause "requires only such facts as make wrongdoing or the discovery of evidence thereof probable." *Id.* at 157.

"Probable cause has been defined as the knowledge of facts sufficient to justify a reasonable [person] in the belief that he has reasonable grounds for prosecuting an action.... Mere conjecture or suspicion is insufficient. . . .Moreover, belief alone, no matter how sincere it may be, is not enough, since it must be based on circumstances which make it reasonable. Although want of probable cause is negative in character, the burden is upon the plaintiff to prove affirmatively, by circumstances or otherwise, that the defendant had no reasonable ground for instituting the criminal proceeding." (Citations omitted.) Zenik v. O'Brien, supra 137 Conn. App. 597, 79 A.2d 769.

It has long been recognized that, where there is no dispute as to what facts were relied on to demonstrate probable cause, the existence of probable cause is a question of law for the court. Walczyk v. Rio, et al, 496 3d 139,157 2d Cir. 2007); *See,* Stewart v. Sonneborn, 98 U.S. 187, 194, 25 L. Ed. 116 (1878) (observing that whether facts alleged to show probable cause are true is a matter of fact, "but whether, supposing them to be true, they amount to a probable cause, is a question of law" (internal quotation marks omitted)); accord Director General of Railroads v. Kastenbaum, 263 U.S. 25, 28, 44 S.Ct. 52, 68 L. Ed. 146 (1923) probable cause if proved").

Liability under §1983 may be anchored in a claim for malicious prosecution, as this tort "typically implicates constitutional rights secured by the Fourteenth Amendment, such as deprivation of liberty." Easton, 947 F.2d at 1017. Though Section 1983 provides the federal claim, the elements of the underlying malicious prosecution tort are borrowed from state law. *See,* Raysor v. Port Authority of New York and New Jersey, 768 F.2d 34, 39 (2d Cir. 1985), cert. denied, 475 U.S. 1027, 89 L. Ed. 2d 337, 106 S. Ct. 1227 (1986). Holman v. Cascio, 390 F. Supp. 2d 120, 122 (D. Conn. 2005) (quoting QSP, Inc. v. Aetna Casualty & Surety Co., 256 Conn. 343, 360 n. 16, 773 A.2d 906 (Conn. 2001); McHale v. W.B.S. Corp., 187 Conn. 444, 447, 446 A.2d 815 (Conn. 1982); Vandersluis v. Weil, 176 Conn. 353, 356, 407 A.2d 982 (Conn. 1978)). In order to prevail on a malicious prosecution claim under both Section 1983 and state law, a plaintiff is required to demonstrate "that there was no probable cause for the proceeding." Mitchell, 841 F.3d at 79 (quoting Kinzer v. Jackson, 316 F.3d 139, 143 (2d Cir. 2003)). In a malicious prosecution action, "it is necessary to prove want of probable cause, malice and a termination of [the] suit in the plaintiffs' favor." DeLaurentis v. New Haven, 220 Conn. 225, 248, 597 A.2d 807 (1991).

The fact that the Plaintiff was ultimately found not guilty of the charge is not dispositive. "[P]robable cause does not require an officer to be certain that subsequent prosecution of the arrestee will be successful." Krause v. Bennett, 887 F.2d 362, 371 (2d Cir. 1989). Moreover, the failure of an arrest to lead to a conviction does not establish a lack of probable cause for that arrest because "[t]he quantum of evidence required to establish probable cause to arrest need not reach the level of evidence necessary to support a conviction...." United States v. Fisher, 702 F.2d 372, 375 (2d Cir. 1983).

"Probable cause is a flexible, common-sense standard." Texas v. Brown, 460 U.S. 730, 742 (1983). "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." United States v. Bakhtiari, 913 F.2d 1053, 1062 (2d Cir. 1990). "The principal components of a determination of . . . probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to… probable cause." Ornelas v. United States, 517 U.S. 690, 696 (1996).

Probable cause exists when the facts and circumstances within the knowledge of the officer and of which he has reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that a [crime] has been committed.

Massimino was arrested for violating Conn. Gen. Stat. §53a-167a, Interfering with An Officer, which provides as follows:

> Sec. 53a-167a. Interfering with an officer: Class A misdemeanor or class D felony.
> (a) A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer, special policeman appointed under Section 29-18b or firefighter in the performance of such peace officer's, special policeman's or firefighter's duties. (Emphasis added)

Here, the officers had probable cause to arrest Massimino for violation of Conn. Gen. Stat. §53a-167a. Massimino obstructed, resisted, hindered and endangered the defendant officers in the performance of their duties. The Defendant officers possessed reasonable suspicion as noted in Section IV A & B of this Memorandum of Law to approach Massimino to inquire about his actions. Since the Defendants had authority to perform a Terry stop, they had the authority to request identification from Massimino and his continued refusal to

produce identification, including his credentials as a purported journalist, and his consistent engagement in the hindering, obstruction and resistance of the defendant peace officers in the performance of their investigative duties. State v. Aloi, 280 Conn. 824 911 A.2d 1086, 2007 Conn. LEXIS 2 (2007)

In State v. Aoi, supra, the Court noted the difference between police asking for identification just to ask for identification rather than asking for identification when acting within the scope of their investigatory duties. At 820. "[A] suspect's refusal to comply with a lawful police command to provide identification following a Terry stop is likely to impeded a delay in the process of the police investigation, even when the refusal is peaceable.". . .This refusal to comply with a police command to provide identification in the course of a Terry stop may constitute a violation of Conn. Gen. Stat. §53a-167a even if that refusal is unaccompanied by any physical force or affirmative act." In the present case the defendant officers did not ask for identification just to ask for it, they had grounds upon which to approach Massimino and investigate their concerns.

Once the valid Terry stop occurred, Massimino was duty bound to produce identification in response to the request of the officers. His continued refusal not only heightened the Defendants degree of suspicion, but created a basis upon which probable cause existed to arrest Massimino for his obstruction, hindering and resisting of the defendant officers in the performance of their investigatory duties. Since probable cause existed for his arrest, his Fourth Amendment claims fail and the Defendants' Motion for Summary Judgment should be granted.

E. Even if the Plaintiff had met his Burden to Demonstrate an Issue Concerning the Absence of Probable Cause, his Success in his Malicious Prosecution Claim also Requires Proof of Malice

To satisfy element (2) of Connecticut's malicious prosecution claim, the plaintiff must prove that "the action was brought with malice." Id. An act of malice asserts, "that the defendant must have commenced the criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served."

Under Connecticut law, malice is demonstrated when "a prosecution was undertaken for 'improper or wrongful motives, or in reckless disregard of the rights of the plaintiff,' including initiating proceeding without probable cause." Turner v. Boye, 116 F. Supp. 3d 58, 85 (2015 (quoting Pinsky v Duncan, 79 F.3d 306, 313 (2d Cir. 1996))

Malice and probable cause usually compete with each other, however, "lack of probable cause does not definitively establish that a defendant acted with malice." Manganiello v. City of N.Y., 612 F.3d 149, 163 (2d Cir. 2010). The presence of malice can only reasonably be inferred, "where probable cause to initiate a proceeding is so totally lacking." Sulkowska v. City of New York, 129 F. Supp. 2d 274, 295 (S.D.N.Y. 2001 (internal quotations omitted). Otherwise, both elements must be analyzed independently in a malicious prosecution action. Id.

The court in Sulkowska articulates a dramatic threshold to illustrate the relationship between probable cause and malice. This viewpoint is significant because it requires the plaintiff to provide evidence establishing malice independently, and not simply infer it based on the lack of probable cause.

The Plaintiff cannot produce any admissible evidence to meet his burden that the defendant officers or either of them asked with malice.

F. The Defendants are Entitled to Qualified Immunity

1. Even if the Court were to conclude that the Defendants are not entitled to summary judgment based upon the arguments previously set forth, the Defendants are entitled to invoke the defense of Qualified Immunity

Under the undisputed facts neither Officer Benoit nor Laone violated Massimino's constitutional rights. Massimino is unable to establish that any violation of his First or Fourth Amendment rights occurred.

Qualified immunity first requires resolution of a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L. Ed. 2d 272, 377-378 188 L. 2d 1056 (2014); Plumhoff v. Rickard, 872 U.S. 765 134 S.Ct. 2012 188 L. Ed. 2d (2014); Scott v. Harris, 550 U.S. 372 127 S. Ct. 1769 167 L. Ed. 2d. 686 (2007). In resolving questions of qualified immunity, courts are required to initially resolve that threshold question. If, and only if, the court finds a violation of a constitutional right, "the next sequential step is to ask whether the right was clearly established in light of the specific context of the case." *Ibid.*

Massimino's claims of both an unreasonable search and seizure in violation of his Fourth Amendment rights as well as a violation of his First Amendment rights require analyzing the totality of the circumstances from the perspective "of a reasonable officer on the scene." Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L. Ed. 2d 443.

In Saucier v. Katz, 533 U. S. 194, 200, 121 S.Ct. 2151, 150 L. Ed. 2d 272 (2001), the Supreme Court held that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged." Only after deciding that question may Appellate Court turn to the question whether the right at issue was clearly established at the relevant time. *Ibid.*

In Graham v. Connor, 490 U. S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); the Supreme Court determined the objective reasonableness of a particular seizure under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 U. S., at 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (internal quotation marks omitted). The inquiry requires analyzing the totality of the circumstances. See ibid. See also Tennessee v. Garner, 471 U. S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)

The Court must analyze this question from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid*. Consideration of this issue must allow for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain, and rapidly evolving about what is necessary in a particular situation. *Id.*, at 396-397, 109 S.Ct. 1865, 104 L. Ed. 2d 443.

The actions of the Defendant officers were objectively reasonable and, therefore, neither the Plaintiff's First nor Fourth Amendment rights were violated.

2. Assuming arguendo that Massimino's First and/or Fourth Amendment rights were violated Benoit and Laone nonetheless are entitled to Qualified Immunity

Even where an officer is found to have violated a person's constitutional rights, however, the doctrine of qualified immunity will shield that officer from liability for damages if his "conduct d[id] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Mullenix v. Luna, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015)(internal quotation marks omitted); *see, e.g.*, Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L. Ed. 2d 523 (1987).

Qualified immunity protects officials from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Taravella v. Town of Wolcott, 599 F.3d 129, 133 (2d Cir. 2010). When a defendant invokes qualified immunity, courts consider whether the plaintiff has shown, "(1) that the defendant violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct. Wood v. Moss, 572 U.S. 744, 757, 134 S.Ct. 2056, 188 L. Ed 2d 1039 (20140) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 735 131 S.Ct. 2074, 179 L. Ed. 2d 1149 (2011)). "A right is clearly established only if its contours are sufficiently clear that 'a reasonable official would understand that what he is doing violates that right.'" Carroll v. Carman, 574 U.S. 13, 135 S.Ct. 348, 350 190 L. Ed. 2d 311 (quoting Anderson v. Creighton, 483 U.S. 635, 640 107 S.Ct. 3034, 97 L. Ed. 2d 523 (1987).

To determine whether the relevant law was clearly established, consideration must be given to whether a right is defined with specificity, the existence of Supreme Court or Court of

Appeals case law on the subject, and the understanding of a reasonable officer in light of preexisting law." Terebesi, 764 F. 3d at 222. An officer is entitled to qualified immunity if "any reasonable officer, out of the wide range of reasonable people who enforce the laws in this country, could have determined that the challenged action was lawful." Figueroa v. Mazza, 825 F. 3d 89, 100 (2d Cir. 2016). The inquiry on qualified immunity is not whether the officer should have acted as he did, nor is it whether a singular, hypothetical entity exemplifying the "reasonable officer" have acted in the same way.

The United States Supreme Court has repeatedly held that a police officer is entitled to qualified immunity if "a reasonable officer could have believed [his actions] lawful, in light of clearly established law and the information the . . . officer [] possessed." Anderson v. Creighton, 483 U.S. 635 (1987); White v. Pauly, 137 S.Ct. 548, 551 (2017) (per curiam); Kisela v. Hughes, 138 S.Ct. 1148, 1152 (2018).

In order for the law to be clearly established, "[t]he contours of [a] right must be sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." Anderson, 483 U.S. at 640. In other words, "existing precedent must have placed the constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011.)

Moreover, clearly established law must be determined "in light of the specific context of the case, not as broad general proposition." Brosseau v. Haugen, 542 U.S. 194, 198 (2004). Indeed, the Supreme Court has repeatedly admonished the Appellate Courts for defining the clearly established law at too high a level of generality. *See,* Kisela, 138 S.Ct., at 1152; City and County of San Francisco v. Sheehan, 135 S.Ct. 1765, 1775-76 (2015);

al-Kidd, 563 U.S. at 742. Qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id*. at 743.

In District of Columbia v. Wesby, 138 S.Ct. 577 (2018), the Court again emphasized, "[w] have not yet decided what precedents - other than our own - qualify as controlling authority for purposes of qualified immunity." 138 S.Ct. at 591 n.8. The Court held that the officer in the case before it was entitled to qualified immunity for wrongful arrest because the lower court had relied on a single decision from that court, which the Supreme Court found largely inapposite. The Court emphasized that ''a body of relevant case law' is usually necessary to" clearly establish the law for purposes of qualified immunity. *Id.* at 590.

More recently, in City of Escondido v. Emmons, 139 S.Ct. 500, 503 (2019) the Court once again noted that it had not decided what precedents other than its own could clearly establish the relevant law, but granted qualified immunity based upon the absence of applicable law within the circuit in which the case arose concerning the precise factual situation confronted by the officer.

Existing authority must be highly factually analogous to the situation confronted by the officers in a particular case in order to constitute clearly established law for purposes of defeating qualified immunity. As the Court emphasized in Plumhoff v. Richard, 134 S.Ct. 2012, 2023 (2014), "[T]he crucial question [is] whether the official acted reasonably in the *particular circumstances* that he or she faced." (Emphasis added.)

The Court highlighted the fact-specific nature of the inquiry, which made it essential that there be some authority directly on point in order to defeat immunity. Kisela v. Hughes, 148 S.Ct. 1148 (2018) (per curiam). The result depends very much on the facts of each

case, and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue. Id. at 1153.

Although several other circuits have addressed the issue of a First Amendment right to record police activity, only the Fifth Circuit has addressed the issue of videotaping police activity outside a police station. Turner v. Driver, 848 F.3d 678 (5th Cir. 2017) The Ninth[2], Eleventh[3], First[4], Seventh[5] Circuits and after the decision in Turner, the Fifth[6] Circuit hold that the right to record the police is "clearly established." Contrastingly, the Third[7] and Fourth[8] Circuits have held that the Right to Record the Police is *NOT* "clearly established." Notably, this leaves the Second and Sixth Circuits "undecided" on the issue of whether a "clearly established" right exists to record the police.

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[2] *Id*. Citing Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995) ("The Ninth Circuit found that Fordyce had a 'First Amendment' right to film matters of public interest' but did not provide an analysis for this conclusion").
[3] *Id*. Citing Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The Eleventh Circuit held 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.'").
[4] *Id*. Citing Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011) ("The court boldly chose to address the difficult constitutional issue at hand and framed the issue by asking: 'Is there a constitutionally protected right to videotape police carrying out their duties in public?'. . . In a unanimous decision, the First Circuit ultimately held that a citizen's right to record the police 'is a basic, vital, and well-established liberty safeguarded by the First Amendment' and the officers were not entitled to qualified immunity because this right was clearly established.").
[5] *Id*. Citing American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012) ("The Seventh Circuit held that the First Amendment protects the audio recording of the police and concluded that the wiretapping statute, which criminalized the audio recording of police officers, warranted heightened scrutiny because of its burden on First Amendment Rights.").
[6] *Id*. Citing Turner v. Driver, 848 F.3d 678, 687-88 (5th Cir. 2017) ("The Fifth Circuit pointed out that neither the Supreme Court, nor the Fifth Circuit has found that the First Amendment protects an individual's right to record the police . . . although the right to record the police was not clearly established at the time Turner was detained by the police, going forward, the right is clearly established in the Fifth Circuit.").
[7] *Id*. Citing Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010) ("The Third Circuit affirmed the district court's ruling and reasoned that (1) the right to record the police had only been 'hypothesized,' (2) cases that support a 'general right to record' were 'insufficiently analogous' to this case, and (3) the analogous cases Kelly cited were not sufficient to find the right clearly established.").
[8] *Id*. Citing Szymecki v. Houck, 353 F. App'x 852, 853 (4th Cir. 2009) ("The Fourth Circuit. . . rejected the notion that the right to record the police is clearly established in the circuit. The court did not provide an analysis of facts or law and failed to outline how cases should be brought in the future. In spite of this finding, other district courts within the Fourth Circuit have found that video recordings of police activity, which are done peacefully and without interfering with the performance of police duties, are protected by the First Amendment.").

Absent even one decision by the Second Circuit, at the time of the subject incident on the issue of whether videotaping police activity, and even more specifically a police station, is a clearly defined right, the defendants could not have known that their actions violated a clearly defined right and, therefore, are entitled to Qualified Immunity. At present, since the federal circuit courts are not in agreement that such a constitutional right exists, it cannot be a clearly defined right of which the defendants should have known.

The decision of the Fifth Circuit, although not binding precedent in the Second Circuit, sets forth a useful analysis of qualified immunity in a claimed First Amendment violation.

Turner, the plaintiff in that case, was videotaping the Fort Worth Police Station from a public sidewalk across the street from the station when he was approached by a defendant police officer who repeatedly asked for his identification. When Turner asked if he was being detained, the defendant officer responded that he was being detained for investigation. The defendant officer continued to ask Turner to produce identification which he refused at which point he was "suddenly and without warning" handcuffed and placed in a police cruiser and was told, "this is what happens when you don't I.D. yourself." Turner alleged that the officers placed him in a police cruiser and they "left him there to sweat for a while with the windows rolled up." Turner alleged that no air was getting to the back seat and that he banged on the door so the officers would roll down the windows. Turner was subsequently removed from the police cruiser, the handcuffs were removed, his camera was returned to him, and he was released without being arrested or charged with any offense.

Turner instituted a §1983 claim in which he asserted a violation of his First, Fourth and Fourteenth Amendment rights. The district court granted the Defendants' Motion to Dismiss based upon Qualified Immunity. Turner appealed to the Fifth Circuit Court of Appeals.

On the First Amendment issue, the Court agreed that the District Court ruling that the First Amendment right to video record police activity was not clearly established and concurred with that conclusion. "Where no controlling authority specifically prohibits the defendant's conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established." "At the time in question, neither the Supreme Court nor this court had determined whether First Amendment protection extends to the recording or filming of police." *Id.* at 686.

In the present case the same is true, there was not at the time of the subject incident a clearly defined constitutional right in the Second Circuit to videotape police activity or more specifically a police station. Therefore, no such clearly established right existed.

Although in Turner, the plaintiff was videotaping the exterior of the Fort Worth Police Department, and police activity in and around the police station, the Fifth Circuit's decision appears to be based upon the broader concept of police activity as opposed to the more narrow issue of a police department building. In that regard, the Court did note that "'the filming of government officials engaged in their duties in a public place, including police officers preforming their responsibilities fits comfortably within the basic First Amendment principles'" "This right however 'is not without limitations.'" "Like all speech, filming the police 'may be subject to reasonable time, place and manner restrictions.'" *Id*. at 690.

In Turner the defendants were not granted Qualified Immunity for the claimed violation of Turner's Fourth Amendment right to be free from an unlawful arrest. Not only did the Court conclude that no probable cause existed to arrest or detain Turner, the defendant officers did not dispute that if Turner was found to have been "arrested" the defendant officers lacked probable cause. No Texas law existed similar to Conn. Gen. Stat. §53a-167a under which Turner could be charged for failing to show identification to investigating officers.

In Turner, the defendants reasoning for detaining the plaintiff was based solely on his failure to show his ID which did not violate any Texas law. In the present case, however, the refusal to provide identification was a violation of Conn. Gen. Stat. §53a-167a for which under controlling Connecticut law, the defendants had probable cause to arrest Massimino for his failure to comply with a lawful order to produce identification for thus obstructing, hindering and resisting the Defendant officers in the performance of their investigating duties. (See State v. Aloi, supra)

The Turner Court proceeded to determine whether the plaintiff's Fourth Amendment claim was also subject to the Qualified Immunity defense. The Court noted that Turner's Amended Complaint asserted that he was videotaping "the routine activities at the Fort Worth Police Department building." The Court found that "Turner's filming in front of the police station 'potentially threatened security procedures at a location where order was paramount.'" "An objectively reasonable person in [the defendants'] position could have suspected that Turner was casing the station for an attack, stalking an officer or otherwise preparing criminal activity, and thus could have found Turner's filming of the "routine activities" of the station sufficiently suspicious to warrant questioning and a brief detention. The officers' detention of

Turner under these circumstances was not 'plainly incompetent' or a knowing violation of the law." The Court concluded that the initial questioning or detention of Turner before he was handcuffed was not objectively unreasonable in light of clearly established law.

In the present case, the same would be true with regard to any pre-arrest investigation and discussions and detention of Massimino by the defendants. Qualified Immunity would apply to any pre-arrest conduct of the defendants.

A distinction must be made when an officer simply stops an individual and demands identification without any specific basis for believing the individual maybe involved in some criminal activity. See, Hiibel v. Sixth Judicial District Court of Nev. Humboldt Cty, 542 U.S. 177, 188 124 S.Ct 2451, 159 L. Ed. 2d. 292 (2004); see also State v. Aloi, supra. In the present case, the defendants specifically told Massimino the police station was not a public building, that they had reasonable suspicion and "safety concerns," including whether his videotaping was to blow up or shoot up the building. Massimino was made aware of the officers' specific concerns, the purpose of their questioning and their safety concerns. Massimino nonetheless continued to obstruct, resist and hinder the officers' investigation and potentially endanger officer safety in the performance of their duties.

Although the Turner Court did not have the benefit of a video and the defendants' version of the encounter with Turner, the Court nonetheless assumed that Turner's filming in front of the police station "potentially threatened security procedures at a location where order was paramount" and that it was reasonable for the officers to have suspected that Turner was "otherwise preparing for criminal activity . . . and found the filming of the station "sufficiently suspicious to warrant questioning and a brief detention."

The facts before the Court in this case are greatly enhanced from the facts in Turner. As noted previously, the application of the qualified immunity defense is highly fact specific. The defendants herein contend that their actions in placing Massimino under arrest were "objectively reasonable" and if not "objectively reasonable" there was no clearly defined right of the plaintiff to be free from seizure and arrest under the facts of this case.

The defense of qualified immunity "shields law enforcement officers from §1983 claims for money damages provided that their conduct does not violate clearly established constitutional rights of which a reasonable person would have been aware." Zalaski, 723 F.3d at 388. The doctrine aims to give officials room to act with confidence in gray areas by absolving from personal liability "all but the plainly incompetent or those who knowingly violate the law." Mullenix v. Luna, 136 S.Ct. 305, 308 193 L. Ed. 2d 255 (2015) (quoting Malley 475 U.S. at 341).

In addition, police officers are entitled to draw reasonable inferences from the facts they possess at the time of a seizure based upon their own experiences. *See* Ornelas v. United States, 517 U.S. 690699, 134 L. Ed. 2d. 911, 116 S.Ct. 1657 (1996) (noting that "a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts and when seen together yield inferences that deserve deference".

When a plaintiff alleges that a law enforcement officer's official conduct renders him personally liable in damages, the inquiry is not whether the officer should have acted as he did. Nor is it whether a singular, hypothetical entity exemplifying the "reasonable officer" – a creature akin to the "reasonable man" of the law of torts. *See* Restatement (Second) of Torts

§283 cmt. c, (Am. Law Inst. 1975) – would have acted in the same way. It is instead whether any reasonable officer, out of the wide range of reasonable people who enforce the laws in this country, could have determined that the challenged action was lawful. *See* Malley, 475 U.S. at 341; compare Walczyk v. Rio, 496 F.3d 157 n. 16 (2d Cir. 2007), with *Id*. at 169-170. (Sotomayor, J., concurring).

Applying this standard to the facts of the present case, the defendants are entitled to Qualified Immunity on Massimino's §1983 First and Fourth Amendment claims as no violation of Massimino's constitutional rights occurred and even if such a constitutional right existed, there was no clearly defined right to videotape a police department or police activity.

V. CONCLUSION

The defendants are entitled to summary judgment on both Massimino's First and Fourth amendment claims and for the foregoing reasons, Defendants Benoit and Laone respectfully request that their Motion for Summary Judgment be granted.

DEFENDANTS, MATTHEW BENOIT AND FRANK LAONE

BY: /s/ ct05394

Joseph A. Mengacci, Special Counsel
Federal Bar Number: ct05394
Office of Corporation Counsel
235 Grand Street, 3rd Floor
Waterbury, Connecticut 06702
Phone: (203) 574-6731
Fax: (203) 574-8340
jmengacci@waterburyct.org

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.

BY: /s/ ct05394
Joseph A. Mengacci