16-3994

In the
United States Court of Appeals
For the Second Circuit

DOUGLAS J. HIGGINBOTHAM,

Plaintiff-Appellant,

v.

POLICE OFFICER CURTIS SYLVESTER, SHIELD 5060,
POLICE SERGEANT CHRISTOPHER TOMLINSON, SHIELD 3686
and DEPUTY INSPECTOR THOMAS TAFFEE,

Defendants-Appellees,

- and -

CITY OF NEW YORK and POLICE CAPTAIN JOHN DOE,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF JURISDTICTION

Plaintiff Douglas J. Higginbotham, appeals a decision by the Honorable P. Kevin Castel, dated November 2, 2016, granting Defendants' Motion for Summary Judgment brought pursuant to Fed. R. Civ. P. 56. (App. 57). Subject matter jurisdiction in the District Court was based on 42 U.S.C. §1983 and the factual allegations of false arrest and a violation of Plaintiff's First Amendment Rights.

This Court has jurisdiction pursuant to 28 U.S.C. §1292(a) (1) as Plaintiff appeals from a final decision on a motion for summary judgment dismissing all of his claims. The Notice of Appeal was timely filed on November 30, 2016. (App. 293).

ISSUES PRESENTED

This appeal presents the following issues for review:

1. Did the District Court err when it held that the Plaintiff, a credentialed journalist, was not protected by the First Amendment as he attempted to record police activity at an Occupy Wall Street protest?

2. Did the District Court err when it held that Plaintiff's arrest was based on probable cause or arguable probable cause for the charge of reckless endangerment?

3. Did probable cause or arguable probable cause for arrest exist for any crimes not considered by the District Court?

STATEMENT OF THE CASE

Plaintiff Douglas J. Higginbotham brought suit pursuant to 42 U.S.C. §1983 for false arrest and violation of his rights under the First Amendment. [1] The claims arose out of his arrest while working as a professional cameraman for TV New Zealand. Plaintiff had been filming an Occupy Wall Street demonstration while positioned on the roof of a double-width telephone booth in Lower Manhattan.

Defendants initially moved for dismissal of the Complaint pursuant to Fed. R. Civ. P. 12 (b)(6). The motion was denied in part and granted in part by the District Court. (App. 11). [2] In that decision, the District Court held that the complaint had adequately pleaded causes of action for false arrest and a First Amendment violation, but dismissed the claims for malicious prosecution and as against the municipal defendant. Plaintiff subsequently filed an Amended Complaint. (App. 35). After the close of discovery, Defendants moved for summary judgment, arguing that probable cause for arrest could be premised on

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[1] The Complaint that appears at Docket Entry 1 is not the Complaint filed with the court and served on the defendants. The proper document appears at App. 64.

[2] The decision of the court is published at Higginbotham v. City of New York, 105 F. Supp. 3d 369 (S.D.N.Y. 2015).

several different criminal charges. (App. 57). In addition, Defendants claimed that summary judgment was appropriate on the grounds of qualified immunity. Finally, Defendants asserted that because there was probable cause for an arrest, Plaintiff's First Amendment claim was without merit.

On November 2, 2016, Judge Castel granted Defendants' Motion for Summary Judgment, holding: there was probable cause to arrest for the crime of Reckless Endangerment in the Second Degree; the officers were entitled to qualified immunity; that the probable cause for arrest precluded a valid First Amendment claim and that no reasonable jury could conclude that the motivation for the arrest was to impede the exercise of Plaintiff's First Amendment rights. (App. 279).

STATEMENT OF FACTS

On November 15, 2011, Plaintiff was working as a cameraman, together with a reporter for TV New Zealand, covering an Occupy Wall Street demonstration at Zuccotti Park. (App. 204 at ln. 16 to 205 at ln. 15). Plaintiff had been covering the Occupy Wall Street demonstrations for a number of months for different international news organizations. (App. 204 at ln. 5).

During the course of the demonstration, Plaintiff, whose press credentials were clearly visible around his neck, (App. 163 and 171) climbed atop a telephone

booth to get a better angle for taking the video. (App. 114 at ln. 15-17; App. 151 and 152). The roof of the phone booth was 7'4" above the ground (App. 176); was 6'8" long and 3'4" wide, with a slightly curved surface. (App. 152; 154; 186-87; 253). At that time, Plaintiff was 5'9" tall and was carrying a professional grade camera that weighed about thirty pounds. (App. 108 at ln. 1 and 113 at ln. 18). The camera and attached equipment were secured by a hand strap and was balanced on Plaintiff's shoulder. (App. 114 at ln. 12; App. 154).

When Plaintiff first climbed atop the booth, some of the officers involved in his subsequent arrest were there, but they neither addressed him nor ordered him to come down. (App. 226 at ln. 3-8; App. 273). After about five minutes, Plaintiff got down from the booth to continue filming with the reporter. (App. 208 at ln. 4-7). Plaintiff subsequently returned to the top of the booth and resumed filming. (App. 208 at ln. 14-16). At the same time, there was a police detective standing atop a truck filming the demonstration. (App. 54 at par. 6 and App. 155). The video made by that detective could not be located by the police department. (App. 55 at par. 9). After about five minutes, at the point where the confrontation between the police and the demonstrators was turning violent (App. 226 at ln. 20 to 227 at ln. 10; App. 256-258), Plaintiff was asked one time to get down by Defendant Sylvester and another unknown officer. (App. 117 at ln. 14 and App.

175.1 at 2:48). [3] Plaintiff did not immediately comply with that request and continued taping. (App. 117 at ln. 21 to118 at ln. 1). About thirty seconds later Plaintiff was instructed to get down several times by Defendant Taffe. (App. 175.1 at 2:48-3:37). When first addressed by Taffe, Plaintiff "spun around in a crouch stance," pointed the camera at Taffe and then turned back around. (App. 245 at ln. 10-13). Plaintiff began to get down from the booth about five seconds after Taffe's order. (App. 175.1 at 3:13-3:18).

Rather than allow Plaintiff to climb from booth, several officers including Sylvester, pulled him by his head, arms and legs. (App. 210 at ln. 15-22 and App. 155). Plaintiff was taken into custody by Sylvester without instruction from his immediate superiors at the scene, Defendants Taffe and Tomlinson, as to the arrest charge. (App. 235 at ln. 24 to 236 at ln. 7). When Plaintiff asked why he was being arrested for doing his job, Taffe responded that "he had been warned several times." (App. 247 at ln. 8-10 and App. 175.1 at 5:02 - 5:05). Plaintiff was transported to a precinct for processing where Sylvester was instructed by either a sergeant with the police press office or an officer from the police legal department to charge Plaintiff with disorderly conduct. (App. 238 at ln. 15 to 239 at ln. 14). Plaintiff was issued a summons for disorderly conduct and released. (App. 237 at

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[3] Joint Appendix 175.1 is a disc containing the video made by Plaintiff of the underlying events. References to that video are to the minute and second times on the video.

ln. 13). The charges against Plaintiff were subsequently dismissed without a court appearance by him. (App. 228 at ln. 19-25).

STANDARD OF REVIEW

This Court's standard of review for appeals from motions for summary judgment is de novo. Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002). A district court abuses its discretion "if it applies legal standards incorrectly, relies on clearly erroneous findings of fact, or proceeds on the basis of an erroneous view of the applicable law." Aurelius Capital Partners, LP v. Republic of Argentina, 584 F.3d 120, 129 (2d Cir. 2009). The granting of a motion for summary judgment should be affirmed only where the appellate court concludes, after construing the evidence in a light most favorable to the non-moving party and drawing all reasonable inferences in his favor, that there is no genuine dispute of material fact and the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56 (a); Costello v. City of Burlington, 632 F.3d 41, 45 (2d Cir. 2011). Summary judgment is improper where a reasonable inference can be drawn in favor of the non-movant on which a jury could reasonably find for the plaintiff. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). See Curry v. City of Syracuse, 316 F.3d 324, 333 (2d Cir. 2003); Finley v. Giacobbe, 79 F.3d 1285, 1291 (2d Cir. 1996). The circuit court, however, may affirm on any

grounds for which there is a record sufficient to support probable cause for arrest, including grounds not relied upon by the district court. Mitchell v. City of New York, 841 F.3d 72, 77 (2d Cir. 2016); Holcolmb v. Lykens, 337 F.3d 217, 223 (2d Cir. 2003).

SUMMARY OF ARGUMENT

In order to grant summary judgment on the First Amendment claim, the District Court needed to find that the probable cause for arrest was wholly independent from the improper motive of impeding Plaintiff's conduct as a working journalist. See Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988). The District Court erred in holding that there was no reasonable view of the evidence that would support a distinct violation of Appellant's First Amendment rights. The District Court: (1) ignored the holding in Musso and misapplied this court's holding in Fabrikant v. French, 691 F.3d 193 (2d Cir. 2012) and Mozzochi v. Borden, 959 F.2d 1174 (2d Cir. 1992); and, (2) improperly substituted its judgment on issues properly left to a jury. As such, the motion for summary judgment on the First Amendment claim was granted in error.

In order to grant summary judgment on the false arrest claim, the District Court needed to find that as a matter of law, even when considering the underlying facts and reasonable inferences in a light most favorable to Plaintiff, there was probable cause for his arrest, Costello v. City of Burlington, 632 F.3d 41, 45 (2d

Cir. 2011), or that the defendants were entitled to qualified immunity in making that arrest. See Garcia v. Does, 779 F.3d 84, 92 (2d Cir. 2015). The District Court holding was error because it: (1) failed to view the evidence in the light most favorable to the Plaintiff; (2) failed to draw all reasonable inferences in Plaintiff's favor; and, (3) substituted its judgment on issues properly left to a jury. Moreover, though not considered by the District Court in its ruling, there was no probable cause for arrest on other possible criminal offenses posited by the movants in their motion for summary judgment.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFF'S FIRST AMENDMENT RIGHTS WERE NOT VIOLATED

Summary judgment is appropriate only where there is "no genuine dispute as to any material fact and … the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (a). In considering the motion, the court "must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." Costello v. City of Burlington, 632 F.3d 41, 45 (2d Cir. 2011); American Cas. Co. of Reading Pa. v. Nordic Leasing, 42 F.3d 725, 728 (2d Cir. 1994); Ramsur v. Chase Manhattan Bank, 865 F.2d 460, 465 (2d Cir.

1989). Further, it is a settled rule that "credibility, choices between conflicting versions of events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment." Fischl v. Armitage, 128 F.3d 50, 55 (2d Cir. 1997).

A plaintiff asserting a First Amendment claim must establish that: (1) he has an interest protected by the First Amendment; (2) defendant's actions were motivated or substantially caused by plaintiff's exercise of that right; and (3) defendant's actions effectively chilled the exercise of that right. Dorsett v. County of Nassau, 732 F.3d 157, 160 (2d Cir. 2013) citing, Curley v. Village of Suffern, 268 F.3d 65, 73 (2d Cir. 2001).

In Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988), the plaintiff had been ordered to be silent while expressing comments at a local school board meeting. When the plaintiff did not comply with these orders, he was arrested for disorderly conduct and interfering with a police officer. Id. at 738-39. The Musso court noted that a genuine issue of material fact remained as to whether the plaintiff was silenced because on the content of his speech. Id. at 742. Further, if that was the motive for the order to be silent and the subsequent arrest, then there was a First Amendment violation. Id. at 742-43. Thus, a motion for summary judgment could be defeated by a necessary inquiry into the subjective intent of the defendant. Id. at 743. In affirming the denial of summary judgment on the First Amendment

claim, the court specifically noted that "a rational jury could infer" that the plaintiff was singled out from other speakers because of a dislike for what he had to say. At the same time, of course, a rational jury could conclude the opposite. Thus, "the point is only that the issue must be resolved by the trier of fact" and not decided on a motion for summary judgment. Id. at 743.

Where the unconstitutional subjective intent of the defendant's conduct is alleged, a plaintiff must proffer particularized evidence of direct or circumstantial facts in order to defeat a motion for summary judgment. Blue v. Koren, 72 F.3d 1075, 1084 (2d Cir. 1995) citing Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring). The court in Blue specifically held that "the particularized evidence of improper motive may include expressions by the officials involved regarding their state of mind, circumstances suggesting in a substantial fashion that the plaintiff has been singled out, or the highly unusual nature of the actions taken." 72 F.3d at 1084. See also, Huminski v. Corsones, 396 F.3d 53, 84 (2d Cir. 2005) (citing with approval cases holding that selectively excluding reporters from coverage of events violates the First Amendment and allows government to influence substantive coverage). The unlawful subjective intent of the defendant can be inferred from the facts or circumstantial evidence. Beechwood Restorative Care Center v. Leeds, 436 F.3d 147, 153 (2d Cir. 2001); Hemphill v. Schott, 141 F.3d 412, 419 (2d Cir. 1988).

In granting summary judgment, the District Court did not directly apply this circuit's three-prong test. In its decision denying the motion to dismiss, however, the District Court held that as pleaded the complaint met the three-pronged test. (App. 29-30). As recognized by the District Court, while at the time of these events neither the Supreme Court nor the Second Circuit had conclusively determined the right of a journalist to record police activity in public, the circuits which had addressed the issue -- as well as a number of district courts -- were uniform in holding that such a right existed. (App. 26-29 and cases collected therein). [4] Because the right to record police activity was sufficiently clear that a reasonable officer would understand that an arrest to stop such conduct would be unlawful, Plaintiff's arrest would clearly meet the three-pronged test. To the extent that there is any doubt within this circuit that such a right exists, Plaintiff urges this court to specifically so hold.

In any case, there is nothing in the record to contradict that, at the time of his arrest, Higginbotham was a working professional journalist covering a news event of international interest and that his arrest prevented him from continuing said work. Instead, the District Court held that the probable cause for arrest on the charge of reckless endangerment defeated a First Amendment claim. In addition, the District Court held that because no other cameramen at the scene were arrested,

[4] Defendants did not renew or challenge this holding in the motion for summary judgment.

no reasonable juror could conclude that the motivation for the arrest was to suppress the exercise of First Amendment rights. In so holding, however, the District Court not only misapplied the controlling law of this circuit, but also directly contradicted its own prior conclusions as to the reasonable inferences to be drawn from the facts.

First, the District Court improperly relied on Mozzochi v. Borden, 959 F.2d 1174 (2d Cir. 1992) and Fabrikant v. French, 691 F.3d 193 (2d Cir. 2012), while failing to apply the holdings in Musso v. Hourigan and Blue v. Koren. Both Mozzochi and Fabrikant are readily distinguished from the instant case. In Mozzochi, the arrest and prosecution on a harassment charge were based on the threatening nature of the communication itself. It is clear that the First Amendment does not provide protection for criminal threats. Mozzochi, 959 F.2d at 1178. Moreover, as noted in that decision, there was no evidence that the prosecution of the plaintiff chilled his First Amendment expressions of criticism. Id. at 1179. Indeed, in Mozzachi, the court specifically stated that its decision was not contrary to the holding in Musso. The court stated that if the order to be silent was based on an impermissible criterion, such as the content of plaintiff's speech, then it was a violation of the First Amendment. Id. at 1180. In this case, if the order to get down from the booth was rooted in an impermissible criterion,

specifically preventing a professional journalist from filming a news-worthy event, it too violated the First Amendment.

Similarly, in Fabrikant, the plaintiff was arrested on various animal cruelty charges and subsequently raised a First Amendment retaliation claim. 691 F.2d at 204; see Fabrikant v. French, 722 F. Supp.2d 249, 256 (N.D.N.Y. 2010). Thus, unlike this case or Musso, Fabrikant did not involve a claim that the underlying arrest was rooted in the exercise of the plaintiff's First Amendment rights. Instead, the arrest was alleged to be a pure retaliation for prior expressive conduct.

Second, assuming for purposes of the First Amendment analysis that there was probable cause to arrest, the facts and the reasonable inferences to be drawn in favor of Plaintiff demonstrate that the order to get down from the booth was rooted in an effort to prevent the exercise of protected First Amendment activity. [5] Thus, a jury could reasonably find that: (1) Higginbotham was not instructed to come down the first time that he was on the booth despite the presence of some of the same officers later involved in his removal (App. 226 at ln. 3-8; App. 273); (2) Higginbotham was not instructed to come down the second time he was on the booth until the police conduct started getting rough and violent (App. 226 at ln. 20 to 227 at ln. 10; App. 256-258); (3) Higginbotham had a superior filming position

[5] As discussed in the arguments as to probable cause for arrest, Points II and III, below, Plaintiff contends that there was no probable cause for his arrest.

to all other cameramen that would allow him to see and record more of the confrontation (App. 151 and 152); (4) Higginbotham was removed to ensure that nobody had a vantage point similar to that of the police detective filming the events from the top of a truck (App. 54 at par. 6 and App. 155); (5) Officer Sylvester was not instructed by superiors at the scene as to the arrest charge and, indeed, had to consult officers not even at the scene as to the appropriate charge (App. 235 at ln. 24 to 236 at ln. 7); and, (6) Captain Taffe and another officer did not articulate any charge when questioned by Higginbotham as to why he was being arrested for doing his job, instead simply stating that he had been warned several times to get down (App. 247 at ln. 8-10; App. 175.1 at 5:02- 5:05). Based on these facts, a jury could reasonably infer that Plaintiff was removed from the booth solely to interfere with his filming a situation of escalating police force and that he was singled out for arrest precisely because he had a superior vantage point akin to that of the police detective filming from the top of a truck. See Blue, 72 F.3d at 1084; Musso, 836 F.2d at 743.

Finally, the District Court concluded that because "dozens of camerapersons recording the [same] police interactions" were not arrested, no reasonable jury could conclude that Higginbotham was being targeted for his acts. (App. 291). This, however, critically misconstrues the underlying claim. Plaintiff contends that his removal from the booth and arrest were premised on: (1) his superior filming

position and (2) the escalation of the police-demonstrator confrontation. The viability of this claim was noted by the District Court in its decision on the motion to dismiss. There the court held that "drawing all reasonable inferences in favor of Higginbotham" it is

> plausible that the defendants were attempting to punish him for filming that arrest, images of which might reflect badly on the NYPD. The inference is not defeated by the fact that the defendants arrested only Higginbotham, rather than everyone in the vicinity who had a recording device… Higginbotham could plausibly have been targeted because his position on top of the phone booth presumably gave him a better vantage point, or because it provided a pretext for his arrest.

(App. 29-30). There is simply no explanation why inferences found reasonable by the District Court at the motion to dismiss stage became unreasonable at the motion for summary judgment stage. Similarly, there is no explanation why the District Court contradicted its earlier finding of a reasonable inference that the arrest could have been an unlawful pretext. Because these reasonable inferences raise material issue of genuine fact as to the subjective intent of the defendants, they "must be resolved by the trier of fact" and not the court. Musso, 836 F.2d at 743.

Therefore, the granting of summary judgment on the First Amendment claim was in error.

POINT II

THE DISTRICT COURT ERRED IN HOLDING THERE WAS PROBABLE CAUSE TO SUPPORT AN ARREST FOR RECKLESS ENDANGERMENT OR THAT THE ARRESTING OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY

A. The Facts Do Not Support A Finding of Probable Cause

The District Court erred in holding that as a matter of law there was probable cause to arrest Plaintiff for Reckless Endangerment in the Second Degree pursuant to New York Penal Law §120.20. [6]

It is beyond dispute that the existence of probable cause is a complete defense to an action for false arrest. Ricciuti v. N.Y. City Transit Auth., 124 F.3d 123, 130 (2d Cir. 1997); Singer v. Fulton County Sheriff, 63 F.3d 110, 113 (2d Cir. 1995). To demonstrate the existence of probable cause, the facts must demonstrate that the arresting officer had reasonably trustworthy information to "warrant a man of reasonable caution" to conclude that the person arrested committed an offense, Dunaway v. New York, 442 U.S. 200, 208 (1979); Zellner v. Summerlin, 494 F.3d

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[6] Plaintiff was neither arrested nor charged with this crime. Instead, it was posited by Defendants as an alternative basis for probable cause. The actual arrest charge was disorderly conduct pursuant to Penal Law § 240.20(6). The District Court had previously held that based on the facts alleged, there was no probable cause to support that charge. (App. 14). That holding was not challenged in the Motion for Summary Judgment.

344, 368 (2d Cir. 2007) and that the officer must have reasonably relied upon the information. Bernard v. United States, 25 F.3d 98, 102 (2d Cir. 1994).

Reckless Endangerment in the Second Degree, Penal Law §120.20, requires that the defendant: (1) engage in reckless conduct which creates (2) a substantial risk of serious physical injury to another person. "Reckless" is defined as being aware of and consciously disregarding a substantial and unjustifiable risk. Penal Law §15.05(3). The term "serious physical injury" is specifically defined as "an injury which creates a substantial risk of death, serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." Penal Law §10.00(10).

When viewed in a light most favorable to Plaintiff, the record does not establish a conscious disregard of a substantial and unjustifiable risk. The District Court held the "ascent of the phone booth" recklessly created a substantial risk of serious physical injury. (App. 285). The District Court had previously noted that analysis of the facts required consideration of "the height of the phone booth and its suitability as a platform for a male adult." (App. 16). As demonstrated by the exhibits, the roof structure was 6'8" long and 3'4" wide, essentially the size of a standard office desk. (App. 152; 154; 186-187; 253). In granting summary judgment, however, the District Court minimized the import of the platform's dimensions and instead held that "the curvature of the platform, its sheer height,

and a common understanding of … the law of gravity" was sufficient to conclude that Plaintiff acted recklessly. (App. 286-287). Thus, the District Court held that:

> [b]ased on Higginbotham's position above the crowd atop a phone booth with a curved roof, probable cause existed for a reasonable person to believe that Higginbotham consciously disregarded the risk of losing his balance and falling or dropping his camera from more than seven feet in the air. (App. 286).

In so holding, the District Court failed to consider the evidence and all reasonable inferences in the light most favorable to Plaintiff. Instead, the District Court drew all inferences in favor of the moving party. Viewed in a light most favorable to Plaintiff, and drawing all reasonable inferences in his favor, a jury could reasonably infer that the telephone booth roof was a "suitable platform for a male adult." Indeed, the reasonable inference is that Plaintiff, seeking to obtain the best possible video of the police activity, would take special care to keep his balance, maintain the integrity of his equipment, and not engage in conduct that consciously disregarded a substantial risk of serious physical injury to himself or to another person. (App. 230 at 88 ln. 18).

The facts support a finding that the curvature of the roof was slight and manifest primarily at the edges of the structure. (App. 152; 154; 186-187; 253). Moreover, the size of the roof, essentially the size of an office desk, could in and of

itself support a reasonable inference that it provided a suitable "platform for a male adult." (App. 16). In addition, Plaintiff was removed from the roof and placed under arrest only after he climbed atop that booth a **second** time. When he was first atop the booth, some of the defendants had observed Plaintiff as he filmed the events below for approximately five minutes. (App. 208 at ln. 4-7). These officers did not order Plaintiff down and did not express concern that he was on the booth. (App. 226 at ln. 3-8; App. 273). A reasonable inference could be drawn that these officers concluded that Plaintiff was not in danger of falling from the booth and that he could work there without endangering those below. And, of course, no officer prevented him from climbing atop the booth the second time. Finally, Plaintiff was observed by Defendant Taffe "spinning around" without losing his balance or evidencing any danger of falling. (App. 245 at ln. 10-13). It is reasonable to conclude that if he could maneuver that way without problem, then he could continue filming without danger to those below.

Thus, a jury could reasonably conclude that the officers did not have a reasonably objective belief that Plaintiff was engaging in criminally reckless conduct. Therefore, the finding by the District Court that Plaintiff consciously disregarded the risk of losing his balance or falling from the booth improperly invaded the province of the jury and must be reversed.

Nor can it be said that the second element of reckless endangerment, to wit: a substantial risk of serious physical injury was proved as a matter of law. Serious physical injury is defined under New York law as an event would have resulted in a substantial risk of death, serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. Penal Law §10.00(10) (emphasis supplied).

Plaintiff concedes that had he fallen or dropped his equipment from that height onto someone standing below, there was a substantial risk of some injury. The District Court noted that Plaintiff was 7'4" above the crowd and the camera, on his shoulder, more than thirteen feet in the air. (App. 288). Based on these facts, the District Court held that a person of reasonable caution would conclude that if either Plaintiff or the camera fell from that height, there was a substantial risk that the statutorily defined injury would occur. (App. 288-289).

This, however, requires an inference that either Plaintiff or the camera actually would fall directly onto someone below. That is, neither would land on the platform itself preventing or diminishing impact on the people below. It also, of course, requires an inference that there was a substantial risk a person below would actually be struck. Given that the number of people in close proximity to the booth was fluid (compare App. 152 with App. 175.1 at 2:48-2:51 and 3:13-3:18), this would require an inference that contact was probable at the moment that

the fall occurred. Thus, the District Court again drew all inferences in favor of and not against the moving party. In so doing, the District Court engaged in improper fact-finding and its decision must be reversed.

B. The Defendants Were Not Entitled To Qualified Immunity

Even in the absence of probable cause to arrest, the existence of arguable probable cause will entitle the arresting officers to qualified immunity. See Garcia v. Does, 779 F.3d 84, 92 (2d Cir. 2015). Arguable probable cause exists if, based on the information known to the officer at the time of arrest, either (a) it was objectively reasonable for the officer to believe that probable cause existed or (b) officers of reasonable competence could disagree on whether the probable cause test was met. Id. The analysis turns on the objective legal reasonableness of the defendant's actions. Turkman v. Hasty, 789 F.3d 218, 246 (2d Cir 2015), citing Pearson v. Callahan, 555 U.S. 223, 232 (2009). Qualified immunity will be denied where there are genuine issues of material fact or where undisputed facts and reasonable inferences, viewed in a light most favorable to the non-movant, would preclude a finding of probable cause. Bermudez v. City of New York, 790 F.3d 368, 376 (2d Cir. 2015); Weaver v. Brenner, 40 F.3d 527, 537 (2d Cir. 1994). A genuine issue of fact exists where sufficient evidence exists on which a jury could reasonably find for the plaintiff. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); McClellan v. City of Rensselear, 395 Fed. Appx. 717 (2d Cir. 2010).

In holding that Defendants were entitled to qualified immunity, the District Court again premised its analysis on the height and curvature of the roof while wholly ignoring the size of the platform upon which Plaintiff stood: "As noted above, Higginbotham climbed more than seven feet above the ground atop a phone booth with a curved roof." (App. 289). As demonstrated at Point II.A., above, it is the dimensions of that roof which could reasonably lead to an inference that there was no substantial danger to those below. Because a reasonable inference in favor of Plaintiff would significantly affect the reasonableness of the conclusion that the phone booth was not a "suitable platform for an adult male," the doctrine of qualified immunity was wrongfully applied.

POINT III

THERE WERE NO ALTERNATIVE UNCHARGED CRIMES FOR WHICH PROBABLE CAUSE EXISTED

Although the District Court did not consider other potential criminal charges asserted by Defendants in their motion for summary judgment (App. 289 at fn. 2), this court may still consider these in its de novo review. As such, these alternative claims will be briefly addressed. See Mitchell v. City of New York, 841F.3d 72, 77 (2d Cir. 2016) citing Holcomb v. Lykens, 337 F.3d 217, 223 (2d Cir. 2003).

A. The Facts Do Not Support A Finding Of Probable Cause Or Qualified Immunity For Penal Law §240.20(7)

In the underlying motion, Defendants posited Disorderly Conduct under Penal Law §240.20(7) as a possible basis for a lawful arrest. This subsection requires that a person: (1) with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof; (2) create a hazardous or physically offensive condition; (3) by an act that serves no legitimate purpose.

In the first instance, Plaintiff clearly did not intend to cause public inconvenience, annoyance or alarm by his actions. The only reasonable conclusion from the evidence is that Plaintiff's intent was to get a superior angle for journalistic purposes. As to the element of recklessly causing such a risk, the issue turns on a variety of facts including the suitability of the platform for Plaintiff's conduct. Thus, the analysis is essentially the same as to either the absence of the statutorily required substantial risk or the existence of genuine issues of material fact set forth at Point II, above, and to which the Court is respectfully directed. Finally, it is beyond dispute that the press serves a valuable end in society. See, e.g., WPIX v. League of Women Voters, 595 F. Supp. 1484, 1489 (S.D.N.Y. 1984) and cases collected therein. As such, the only reasonable conclusion from the undisputed facts is that Plaintiff's actions as a journalist served a legitimate purpose; there is no real argument to the contrary. Therefore, because the final

element of the statute cannot be met, probable cause could not exist for an arrest under Penal Law §240.20(7).

Nor can the facts support a claim for qualified immunity. There is no dispute that Plaintiff was functioning as a working professional journalist when he climbed to the top of the phone booth to get a superior filming angle. Thus, as to Penal Law §240.20(7), the information available to the defendants at the time of Plaintiff's arrest precluded any reasonable officer from concluding that Plaintiff's conduct served "no legitimate purpose." Where no reasonable officer could conclude that the act was without a legitimate purpose, there can be no finding of qualified immunity. See Zellner v. Summerlin, 494 F.3d 344, 376 (2d Cir. 2007).

B. The Facts Do Not Support A Finding Of Probable Cause Or Qualified Immunity For Penal Law §145.25

Defendants also suggested the existence of probable cause for a violation of Penal Law §145.25, Reckless Endangerment of Property. This statute requires that a person recklessly engage in conduct that creates a (1) substantial risk of damage to the property of another person (2) in an amount exceeding two hundred and fifty dollars.

The court is again respectfully directed to the prior arguments, Point II, above, as to whether the evidence establishes as a matter of law that Plaintiff's conduct was reckless. The fact that Plaintiff twice stood on the roof for about five minutes at a time, and "spun around" with no apparent problem, would reasonably

demonstrate that it could indeed support his weight. (App. 208 at ln. 14-16; App. 245 at ln. 10-13). Given the length of observations by the defendants of Plaintiff on the roof without any evidence that the structure was in danger of collapse or damage, the only reasonable conclusion is that there was no substantial risk of this occurring. Whether it was reasonable to believe that the booth, which appears as a sturdy and large structure and of solid metal construction, was in danger of damage, is assuredly a material question of fact. [7] (App. 255). As such, a jury could reasonably find that there was no reasonable basis to believe that the booth could be damaged by Plaintiff's conduct. In addition, there was no evidence that any damage that might result, short of destruction, would exceed two hundred and fifty dollars. Therefore, because the elements of the statute were not met, probable cause could not exist for an arrest under Penal Law §145.25. Further, because no reasonable officer could conclude that there was a substantial risk that the monetary element of the statute would be met, there can be no basis for a claim for qualified immunity. See Zellner v. Summerlin, 494 F.3d 344, 376 (2d Cir. 2007).

[7] The plans and specifications for the booth (App. 176-179), though obviously not known to defendants at the time of arrest, conclusively show that this was true.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests the District Court's order granting summary judgment be reversed and the matter be remanded for trial.

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Respectfully submitted,

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