In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1976

AMANDA PIERNER-LYTGE,

Plaintiff-Appellant,

v.

MONTRELL E. HOBBS and FREDRICK GLADNEY,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 20-cv-00567 — **J.P. Stadtmueller**, *Judge*.

ARGUED FEBRUARY 8, 2023 — DECIDED FEBRUARY 23, 2023

Before FLAUM, KIRSCH, and JACKSON-AKIWUMI, *Circuit Judges*.

FLAUM, *Circuit Judge*. One day in April 2020, Amanda Pierner-Lytge strapped a rifle to her back and walked to a local park. The rifle on its own was large, but perhaps even more eye-catching was the spike bayonet affixed to its barrel. Multiple parkgoers reported their concerns to the police. Officers arrived at the park and arrested Pierner-Lytge for disorderly conduct; however, charges were never brought.

Shortly after her arrest, Pierner-Lytge filed a civil rights action against two of the arresting officers—Montrell Hobbs and Fredrick Gladney—alleging violations of her First and Fourth Amendment rights. The district court granted the officers' motion for summary judgment. On appeal, Pierner-Lytge challenges the district court's conclusion that the officers are entitled to qualified immunity on her Fourth Amendment claim. For the following reasons, we affirm.

I. Background

A. Factual Background

Pierner-Lytge lives in West Allis, Wisconsin, and works as a private security officer. She is a staunch supporter of the Second Amendment who believes that by openly carrying firearms in public, she brings attention to one's right to bear arms. Pierner-Lytge admits that this behavior causes a disturbance in her neighborhood. Indeed, people have previously reported her to the police. On two prior occasions, Pierner-Lytge had contact with officers because she was openly carrying a rifle.

On the evening of April 1, 2020, Pierner-Lytge walked from her home to Rainbow Park—a public park near Walker Elementary School that contains a playground and a baseball field. At the time, most indoor public places were closed because of the COVID-19 pandemic. As such, many children and families were reportedly at Rainbow Park that evening.

At the park, Pierner-Lytge carried a rifle with a spike bayonet bolted to the end of the barrel. Combined, the rifle and bayonet measured five feet long. In addition, Pierner-Lytge had a black semi-automatic handgun holstered to her right

hip and wore a duty belt containing pepper spray, a baton, and two pairs of handcuffs.

Hobbs, a Deputy Sheriff with the Milwaukee County Sheriff's Office, and Gladney, a Sergeant with the same office, were on duty at the time. At approximately 6:57 P.M., Hobbs went to Rainbow Park in response to three reports of an armed woman sitting near the baseball field with "lots of kids and families around." When Hobbs arrived, he spoke to one of the individuals who had called the police. The witness told him that, for about ten minutes, Pierner-Lytge had been sitting on the bleachers with a rifle and watching families walk by, which made the witness and her family uncomfortable.

Hobbs observed Pierner-Lytge sitting on the bleachers smoking a cigarette with the rifle and bayonet on her back. Once back-up arrived, Hobbs and another officer approached Pierner-Lytge, identified themselves, and informed her that they had received multiple calls from people concerned about her conduct. The officers asked her what she was doing; Pierner-Lytge replied that she was exercising her Second Amendment rights and playing Pokémon Go. She also confirmed that she had a concealed carry weapon license but said she did not have it with her at the time.

Sergeant Gladney later arrived on the scene. Together, Hobbs and Gladney consulted the West Allis Police Department and learned that the agency had interacted with Pierner-Lytge multiple times under similar circumstances. The Department further informed them that Pierner-Lytge had previously resisted arrest and threatened officers and that she had been the subject of mental health detention proceedings on six prior occasions.

After learning this information, the officers arrested Pierner-Lytge for the crime of disorderly conduct. They instructed her to slowly place the rifle on the ground, and she complied. The officers then confiscated her rifle, bayonet, handgun, and duty belt.

At the time, because of the COVID-19 pandemic, the Sheriff's Office was issuing "order-in" cards that required an arrestee to appear at the Milwaukee County District Attorney's Office (the "MCDA") on a later date. Accordingly, Pierner-Lytge was released from custody and given an order to appear at the MCDA on June 9, 2020. However, the MCDA ultimately did not charge Pierner-Lytge, and all her seized property has since been returned.

B. Procedural Background

About one week after her arrest, Pierner-Lytge filed a lawsuit against Hobbs and Gladney pursuant to 42 U.S.C. § 1983. She alleges that the officers violated her Fourth Amendment rights by arresting her without probable cause. The officers moved for summary judgment, and the district court granted their motion, concluding that the officers are entitled to qualified immunity. Pierner-Lytge now appeals.[1]

[1] Pierner-Lytge also alleges that Gladney violated her First Amendment rights by forcing her to stop recording her encounter with the police. Pierner-Lytge does not advance any arguments related to that claim on appeal and does not respond to Gladney's contention that this amounts to waiver. As a result, Pierner-Lytge has waived any arguments related to the judgment of her First Amendment claim. *See Greenbank v. Great Am. Assurance Co.*, 47 F.4th 618, 629 (7th Cir. 2022); *Terry v. Gary Cmty. Sch. Corp.*, 910 F.3d 1000, 1008 n.2 (7th Cir. 2018).

II. Discussion

We review the district court's grant of summary judgment de novo. *Smith v. City of Janesville*, 40 F.4th 816, 821 (7th Cir. 2022). Summary judgment is appropriate if "there is no genuine dispute of material fact" and the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In applying this standard, we read the facts and draw all reasonable inferences in the light most favorable to Pierner-Lytge, the non-moving party. *Parker v. Brooks Life Sci., Inc.*, 39 F.4th 931, 936 (7th Cir. 2022).

A. Probable Cause

In broad terms, § 1983 authorizes suits against state government officials who violate an individual's federal rights. 42 U.S.C. § 1983. Here, Pierner-Lytge alleges that Hobbs and Gladney violated her Fourth Amendment rights by arresting her without probable cause. Probable cause exists "when a reasonable officer with all the knowledge of the on-scene officers would have believed that the suspect committed an offense defined by state law." *Jump v. Village of Shorewood*, 42 F.4th 782, 789 (7th Cir. 2022). The probable cause "inquiry is purely objective, and the officer's subjective state of mind and beliefs are irrelevant." *Johnson v. Myers*, 53 F.4th 1063, 1068 (7th Cir. 2022) (citation and internal quotation marks omitted). Further, we account for the "totality of the circumstances" rather than "dissect[ing] every fact in isolation." *Jump*, 42 F.4th at 789.

In this case, Pierner-Lytge was arrested for the crime of disorderly conduct, which is defined as:

> (1) Whoever, in a public or private place, engages in violent, abusive, indecent, profane,

> boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.
>
> (2) Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading a firearm, or for carrying or going armed with a firearm or a knife, without regard to whether the firearm is loaded or the firearm or the knife is concealed or openly carried.

Wis. Stat. § 947.01.

Section 947.01(1) captures "*any* type of conduct that is disorderly." *Doubek v. Kaul*, 2022 WI 31, ¶ 14 (emphasis added). As such, the Wisconsin Supreme Court reads the "catch-all" term, "otherwise disorderly conduct," "quite broadly" to mean "only that the defendant's conduct be similar in kind to the conduct enumerated in the statute and that it have a *tendency* to cause or provoke a disturbance, either public or private; it need not *actually* cause a disturbance." *Gonzalez v. Village of West Milwaukee*, 671 F.3d 649, 656 (7th Cir. 2012) (quoting § 947.01(1)). At issue here is this expansive catch-all term; Pierner-Lytge insists that she did not engage in "otherwise disorderly conduct." § 947.01(1).

Pierner-Lytge further argues that her carrying of a rifle with a bayonet warranted protection under § 947.01(2). The Wisconsin legislature added this provision to the statute in 2011 to clarify that a person does not violate the statute by

openly carrying "a firearm or a knife" "[u]nless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply." § 947.01(2). We have previously recognized that § 947.01(2) "poses significant interpretative problems that are best answered by the Supreme Court of Wisconsin" given that it involves "issues of state and municipal governance in matters of public safety." *Gibbs v. Lomas*, 755 F.3d 529, 540 (7th Cir. 2014).

As such, we pass no judgment on whether the disorderly conduct statute actually justified Pierner-Lytge's arrest. *See id.* (noting that "it would be imprudent to base our decision on speculation about the appropriate scope of [§ 947.01(2)]"). Instead, we decide this case on a narrower ground because even assuming probable cause did not exist, Pierner-Lytge fails to refute the officers' qualified immunity defense. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.").

B. Qualified Immunity

"[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (citation and internal quotation marks omitted). "If *either* inquiry is answered in the negative, the defendant official is entitled to summary judgment." *Gibbs*, 755 F.3d at 537; *see also Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (concluding courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first").

Under prong two, Pierner-Lytge must demonstrate that it was clearly established in April 2020 that probable cause to arrest her for disorderly conduct did not exist. *Siddique v. Laliberte*, 972 F.3d 898, 903 (7th Cir. 2020). To be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741. "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Wesby*, 138 S. Ct. at 590. Pierner-Lytge need not produce a case directly on point, but the "legal principle [must] clearly prohibit the officer's conduct in the particular circumstances before him." *Id.* "That sounds like a high bar because it is—qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Lopez v. Sheriff of Cook Cnty.*, 993 F.3d 981, 988 (7th Cir. 2021) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

In fact, the Supreme Court has "stressed that the specificity of the rule is especially important in the Fourth Amendment context." *Wesby*, 138 S. Ct. at 590 (citation and internal quotation marks omitted). When it comes to warrantless arrests, "the rule must obviously resolve whether the circumstances with which [the particular officer] was confronted … constitute[d] probable cause." *Id.* (alterations in original) (citation and internal quotation marks omitted). It follows that "a body of relevant case law is usually necessary to clearly establish the answer with respect to probable cause." *Id.* (citation and internal quotation marks omitted).

In this respect, Pierner-Lytge comes up well short. She has not "identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation under similar circumstances." *Id.* at 591

(citation and internal quotation marks omitted). Instead, Pierner-Lytge relies on a 2009 Advisory Memorandum from the Wisconsin Attorney General entitled, "The Interplay Between Article I, § 25 of the Wisconsin Constitution, The Open Carry of Firearms and Wisconsin's Disorderly Conduct Statute, Wis. Stat. § 947.01." Memorandum from J.B. Van Hollen, Att'y Gen., to Wis. Dist. Att'ys, Deputy Dist. Att'ys & Assistant Dist. Att'ys (Apr. 20, 2009), https://www.doj.state.wi.us/sites/default/files/2009-news/final-open-carry-memo-2009.pdf.

To start, this advisory memo "is not, of course, the sort of definitive statement of the law by the courts that would make a constitutional violation 'clearly established.'" *Gibbs*, 755 F.3d at 541. Beyond that, nothing in the memo would prevent a reasonable officer from deeming Pierner-Lytge's conduct "otherwise disorderly" under § 947.01(1). Recall that "otherwise disorderly conduct" means conduct that is "similar in kind to the conduct enumerated in the statute"[2] and that has "a *tendency* to cause or provoke a disturbance." *Gonzalez*, 671 F.3d at 656. Pierner-Lytge openly carried a rifle with an affixed bayonet and a handgun in a crowded public park where she was reportedly watching families. *Cf. Gibbs*, 755 F.3d at 539 (concluding that "driving quickly down city streets, holding an unholstered gun … in view of other drivers" fits under § 947.01(1)). The multiple calls police received about her behavior further support the conclusion that a reasonable officer could have believed her conduct was "otherwise disorderly." *See Gonzalez*, 671 F.3d at 656 ("Creating … public unease and

[2] Specifically, the statute includes conduct that is "violent, abusive, indecent, profane, boisterous, [or] unreasonably loud." § 947.01(1).

agitation is ordinarily sufficient to establish probable cause to arrest for disorderly conduct ….").

Likewise, the memo does not resolve whether the "facts and circumstances" present here suffice to evince "a criminal or malicious intent" under § 947.01(2), which requires more than openly carrying a firearm or knife. The memo explains that "under certain circumstances, openly carrying a firearm may *contribute* to a disorderly conduct charge," Memorandum from J.B. Van Hollen, ¶ 6 (emphasis added), and then provides examples of such circumstances: a person carrying a "rifle or shotgun through a crowded street while barking at a passerby," *id.*, and "a person brandish[ing] a handgun in public," *id.* ¶ 7. One could argue that Pierner-Lytge's conduct resembles these scenarios. Combined with the information the officers learned about Pierner-Lytge from the West Allis Police Department, a reasonable officer could have concluded that Pierner-Lytge had a "criminal or malicious intent." *See Gibbs*, 755 F.3d at 541. Moreover, the memo does not speak to whether a rifle with a bayonet constitutes "a firearm or a knife," § 947.01(2), in the first place. So, "[f]ar from clearly establishing that [her] conduct was not illegal, the memorandum leaves open the distinct possibility that" § 947.01(2) did not protect her. *Gibbs*, 755 F.3d at 541 (citation omitted).[3]

In sum, while a reasonable officer should have known in April 2020 that simply carrying a firearm or a knife in public does not constitute disorderly conduct, much more is required to show that the legality of Pierner-Lytge's conduct was "beyond debate." *Wesby*, 138 S. Ct. at 589 (citation

[3] Regardless, the memo predates the 2011 amendment by two years, so its relevance to § 947.01(2) is "questionable" at best. *Id.* at 541 n.24.

omitted). To the extent the officers misjudged whether probable cause existed to arrest Pierner-Lytge, it was a reasonable decision given the state of the Wisconsin disorderly conduct statute at the time. *See Mwangangi v. Nielsen*, 48 F.4th 816, 825 (7th Cir. 2022) (explaining that "an officer has arguable probable cause," and is thus entitled to qualified immunity, if "a reasonable officer in the same circumstances and possessing the same knowledge as the officer in question could have reasonably believed that probable cause existed in light of well-established law" (citation and internal quotation marks omitted)); *see also, e.g.*, *Taylor v. Hughes*, 26 F.4th 419, 433–34 (7th Cir. 2022) ("Given the broad language employed by some Illinois cases and the lack of a contrary case directly on point, we conclude that qualified immunity precludes liability … on [the plaintiff's] first false arrest claim."). The district court therefore did not err in granting Hobbs and Gladney qualified immunity as to Pierner-Lytge's Fourth Amendment claim.[4]

III. Conclusion

For the foregoing reasons, we AFFIRM.

[4] Pierner-Lytge also argues, in conclusory fashion, that this Court should abolish the doctrine of qualified immunity, while acknowledging that we are bound to follow Supreme Court precedent. As such, we need not address her argument. *See Borowski v. Bechelli*, 772 F. App'x 338, 339 (7th Cir. 2019) (noting in response to an argument that conflicted with Supreme Court precedent that "we can do no more than acknowledge that [the appellant] has preserved the argument").