SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0654-16T1

MICHAEL LANG,

Plaintiff-Respondent,

v.

CITY OF JERSEY CITY,
DEPUTY POLICE, and
CHIEF ROBERT COWAN,

Defendants,

and

CAPTAIN TOMMY COWAN,

Defendant-Appellant.

Argued October 11, 2017 – Decided June 4, 2018

Before Judges Yannotti, Carroll, and Leone.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3478-14.

Eric Magnelli argued the cause for appellant (Brach Eichler LLC, attorneys; Matthew M. Collins, of counsel and on the briefs; Eric Magnelli, on the briefs).

Louis A. Zayas argued the cause for respondent (Law Offices of Louis A. Zayas, LLC, attorneys; Louis A. Zayas, of counsel and on the brief).

PER CURIAM

Defendant Thomas Cowan appeals an August 31, 2016 order denying summary judgment as to the remaining two counts of a complaint brought by plaintiff, Officer Michael Lang. We granted leave to appeal, and now reverse and remand for entry of summary judgment.

I.

The following facts are undisputed and are taken from the complaint and answer, the parties' statements of material facts, and the documentary record.

Plaintiff is a patrol officer in the Police Department of the City of Jersey City. At the time of the June 9, 2013 incident, Thomas Cowan (pled as "Tommy Cowan") was a Captain in the Department (hereinafter "Captain Cowan"). His brother, defendant Robert Cowan (pled as "Deputy Police, and Chief Robert Cowan"), was a Deputy Chief of the Department, later promoted to Chief (hereinafter "Chief Cowan").

On June 8, 2013, plaintiff worked an evening shift that ended between 10:00 p.m. and midnight, and then went to a tavern. Beginning in the evening hours of June 8 and continuing into the

pre-dawn hours of June 9, plaintiff consumed alcoholic beverages. He could not remember the type or amount he consumed. He was unable to remember what time he left the tavern, or the number or identity of the bartenders. Plaintiff estimated he left the tavern no earlier than 2:28 a.m. on June 9.

A surveillance video from a BP gas station showed plaintiff driving his vehicle into the station's lot at approximately 3:17 a.m. Plaintiff engaged in a conversation with a cab driver. Plaintiff had no recollection of the conversation and could not identify any person shown on the video.

Plaintiff drove his vehicle out of the BP station at 3:26 a.m. He may have gone to his nearby home but only to park momentarily in his driveway before he returned to the BP station at 3:27 a.m.

Plaintiff entered the BP station's convenience store. He had a confrontation with two female customers. They engaged in a discussion which appeared to become heated on the surveillance video. During this discussion, he was assaulted from behind by a male customer who pushed or struck him with sufficient force that he knocked over a candy display, hit his head on the wall, and was taken to the floor inside the convenience store. Plaintiff drew his firearm and pointed it at the male.

Jersey City police officers arrived. A sergeant recognized plaintiff was a police officer. A lieutenant arrived. Plaintiff explained to the lieutenant and the sergeant that he had been assaulted.

Captain Cowan arrived. He did not speak to plaintiff. The lieutenant and sergeant, at the direction of Captain Cowan, charged plaintiff with driving while intoxicated (DWI), N.J.S.A. 39:4-50.

Plaintiff was transported from the BP station to the police department to obtain a breathalyzer test. He refused to submit to a test, and was charged with refusal to submit to a breath test, N.J.S.A. 39:4-50.2. The male assailant was charged with simple assault.

In an informal departmental proceeding, plaintiff was found guilty of using intoxicants while off-duty to a degree as to discredit the police department. He lost three days of comp/vacation time.

The Weehawken Municipal Court dismissed the DWI and refusal charges after police officers would not cooperate with the prosecutor and repeatedly failed to appear to testify.

Plaintiff filed a complaint in the Law Division against the City, Captain Cowan, and Chief Cowan, alleging they violated the

New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -2.[1] The five counts alleged defendants violated the CRA by (1) retaliating against him for his political affiliation, (2) "municipal liability," (3) malicious prosecution, (4) false arrest, and (5) abuse of process.

Defendants moved for summary judgment. In opinions and orders dated August 31, 2016, the trial court dismissed all the counts against the City and Chief Cowan. Regarding Captain Cowan, the court dismissed the counts charging (1) retaliation, (2) municipal liability, and (5) abuse of process. The court denied summary judgment on the counts charging Captain Cowan with (3) malicious prosecution and (4) false arrest. We granted Captain Cowan's motion for leave to appeal that denial of summary judgment.

II.

"In reviewing a grant or denial of summary judgment, an appellate court is bound by the same standard as the trial court under Rule 4:46-2(c)." State v. Perini Corp., 221 N.J. 412, 425 (2015). Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party

[1] Plaintiff's complaint mistakenly cited "N.J.S.A. 10:5-1 et seq.," which is the Law Against Discrimination.

is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "[T]he court must accept as true all the evidence which supports the position of the party defending against the motion and must accord [that party] the benefit of all legitimate inferences which can be deduced therefrom[.]" Id. at 535 (citation omitted).

"Our review of a summary judgment ruling is de novo." Conley v. Guerrero, 228 N.J. 339, 346 (2017). We must hew to that standard of review.

III.

The CRA provides that a "person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or . . . the Constitution or laws of this State, . . . may bring a civil action for damages and for injunctive or other appropriate relief." N.J.S.A. 10:6-2(c). The CRA "is a means of vindicating substantive rights and is not a source of rights itself." Gormley v. Wood-El, 218 N.J. 72, 98 (2014). The CRA "is

modeled off of the analogous Federal Civil Rights Act, 42 U.S.C.A. § 1983," and thus cases applying "[s]ection 1983 may provide guidance in construing our Civil Rights Act." Tumpson v. Farina, 218 N.J. 450, 474 (2014).

Plaintiff claims Captain Cowan violated the CRA and his constitutional rights by ordering, without probable cause, that he be arrested and charged with DWI. "[F]iling criminal charges without probable cause, like an arrest without probable cause, is a constitutional violation actionable under section 1983." Kirk v. Newark, 109 N.J. 173, 185 (1988).

Plaintiff's remaining CRA counts claim Captain Cowan committed malicious prosecution and false arrest. To show malicious prosecution, a plaintiff must establish "that there was an absence of probable cause." Brunson v. Affinity Fed. Credit Union, 199 N.J. 381, 394 (2009). To show false arrest, a plaintiff must prove he was "arrested without legal authority." Mesgleski v. Oraboni, 330 N.J. Super. 10, 24 (App. Div. 2000). "A plaintiff need not prove the lack of probable cause, but the existence of probable cause will nevertheless defeat the action." Id. at 24-25. Thus, "probable cause is an absolute defense to an allegation of malicious prosecution or false arrest." Tarus v. Borough of Pine Hill, 189 N.J. 497, 521 (2007) (citing Wildoner v. Borough of Ramsey, 162 N.J. 375, 389 (2000)).

Moreover, to obtain damages from Captain Cowan, plaintiff must overcome his defense of qualified immunity. "The well-established defense of qualified immunity interposes a significant hurdle for plaintiffs seeking to recover for asserted violations of civil rights at the hands of law-enforcement officials." Morillo v. Torres, 222 N.J. 104, 116 (2015).

"The doctrine of qualified immunity shields law enforcement officers from personal liability for civil rights violations when the officers are acting under color of law in the performance of official duties. This protection extends to suits brought under 42 U.S.C.A. § 1983 and under New Jersey's analogue, the [CRA]," which allege "arresting or charging an individual" without probable cause. Id. at 107-08, 117.

"[M]embers of law enforcement must be permitted to perform their duties without being encumbered by the specter of being sued personally for damages, unless their performance is not objectively reasonable." Id. at 108. "Thus, the defense's protection is denied only to officers who are plainly incompetent in the performance of their duties or who knowingly violate the law." Ibid.

Determining if an officer "is entitled to qualified immunity requires inquiries into whether: (1) the facts, '[t]aken in the light most favorable to the party asserting the injury[] . . .

show the officer's conduct violated a constitutional right'; and (2) that constitutional 'right was clearly established' at the time that [the officer] acted." Brown v. State, 230 N.J. 84, 98 (2017) (citations omitted). "[T]he right the official is alleged to have violated must have been 'clearly established' in a . . . particularized . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Kirk, 109 N.J. at 183-84 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). Therefore, "when a plaintiff asserts that he or she was unlawfully arrested, a law enforcement officer can defend such a claim 'by establishing either that he or she acted with probable cause, or, even if probable cause did not exist, that a reasonable police officer could have believed in its existence.'" Morillo, 222 N.J. at 118-19 (quoting Kirk, 109 N.J. at 184).

IV.

"[T]he central issue in this appeal is whether there was probable cause, or, alternatively, whether it was objectively reasonable for the officers to believe that probable cause existed at the time of plaintiff's arrest." Wildoner, 162 N.J. at 389. Thus, we examine Captain Cowan's evidence, defendant's response, and the trial court's ruling.

A.

Probable cause "'is a well-grounded suspicion that a crime has been or is being committed.'" State v. Marshall, 199 N.J. 602, 610 (2009) (citation omitted). "'Probable cause exists where "the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.'" Schneider v. Simonini, 163 N.J. 336, 361 (2000) (alterations in original) (citation omitted).

"When determining whether probable cause exists, courts must consider the totality of the circumstances, and they must deal with probabilities." Ibid. (citing Illinois v. Gates, 462 U.S. 213, 230-31 (1983)). Proof beyond a reasonable doubt, or even by a preponderance, is not required; "'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" Gates, 462 U.S. at 235 (citation omitted); see Schneider, 163 N.J. at 361; see also State v. Gamble, 218 N.J. 412, 428 (2014).

"[W]hether, under the circumstances, a reasonable police officer could have believed that probable cause existed . . . . is a standard of objective reasonableness, which is a lesser standard than required for probable cause." Schneider, 163 N.J.

at 365. "The only time that standard is not satisfied is when, 'on an objective basis, it is obvious that no reasonably competent officer would have concluded that'" probable cause existed. Id. at 366 (citation omitted); see Morillo, 222 N.J. at 108. "If officers of reasonable competence could disagree on the issue of probable cause, the doctrine of qualified immunity should be applied." Morillo, 222 N.J. at 119 (quoting Connor v. Powell, 162 N.J. 397, 409 (2000)).

In his deposition, Captain Cowan testified he made the decision to arrest plaintiff for DWI "[b]ecause of information [he] had received from [Sergeant Mark Shaw and Lieutenant Patricia Cassidy] as well as [his] viewing of the surveillance video." Thus, we examine their information and the video. See State v. Fioravanti, 46 N.J. 109, 122-23 (1965) (ruling that probable cause can be based on "the total knowledge of all the policemen"); see also State v. Crawley, 187 N.J. 440, 457 (2006).

Sergeant Shaw certified to the following, which was also in his report completed the morning of June 9. He responded to a radio call and arrived at the BP station after 3:30 a.m., spoke to an officer, and was told plaintiff had been involved in an altercation, had been assaulted, and had drawn his duty weapon. Shaw approached plaintiff and smelled the odor of alcohol on his breath. Shaw asked plaintiff for his account of the altercation,

but he could not provide a coherent account of the incident. Shaw again asked plaintiff for his account of the incident. Plaintiff became belligerent and raised his voice. He slurred his words and again failed to provide a coherent account of the incident.

Shaw certified that he reached "the unequivocal opinion" that plaintiff "was intoxicated and under the influence of alcohol at the time" based on his observation of plaintiff's demeanor, his behavior, and the strong odor of alcohol on his breath, which were consistent with the other symptoms of intoxication noted in his report.

Shaw stated in his report and later certified as follows. He asked plaintiff to sit in the front seat of a police car, but plaintiff asked to search his own car for his cellphone. Shaw realized plaintiff had driven to the BP station in his personal vehicle. Shaw summoned the tour commander, Lieutenant Cassidy, who arrived at about 3:51 a.m.

Lieutenant Cassidy certified to the following, which was also in her report completed the morning of June 9. Sergeant Shaw reported plaintiff had been involved in an altercation involving intoxicated persons, had been assaulted, and had to draw his duty weapon. Cassidy spoke to plaintiff, who said he was involved in a verbal altercation with a group at the convenience store and was

assaulted. He refused medical attention, and had no sign of injury.

Cassidy certified Shaw also reported his determination that plaintiff was under the influence of alcohol. Cassidy certified that plaintiff's face was flushed and he smelled of alcohol. Based on his appearance, and her years of experience in the narcotics unit detecting persons under the influence of substances, Cassidy concluded "without a doubt" that plaintiff "was under the influence of intoxicating beverages."

Shaw and Cassidy certified and reported that Cassidy called Captain Cowan, who was City Captain for that shift. When Captain Cowan responded to the scene, he consulted with Shaw. Captain Cowan, Shaw, and Cassidy viewed the videotape showing plaintiff driving into the BP station.

The surveillance video confirmed that plaintiff drove into the BP station twice. It also corroborated that plaintiff was under the influence. Plaintiff drove into the BP station right behind a cab, turned left simultaneously with the cab, and pulled close in front of the cab as if to cut it off. Plaintiff braked suddenly, started forward, braked suddenly again for no obvious reason, and then drove head on at a car entering the station, again braking suddenly, and forcing it to back up.

On the video, after spending eight minutes arguing with the cab driver and walking sometimes unsteadily around the BP station's lot without getting gas or going into the convenience store, plaintiff drove away only to return within two minutes, parking his vehicle at an angle in a driving lane. He entered the convenience store with an unsteady gait, animatedly gesturing with his hands, and soon confronted a male and female for no apparent reason. Plaintiff gestured wildly in the ensuing argument, making no apparent effort to end the argument.[2]

This information was sufficient to establish probable cause to believe plaintiff "operate[d] a motor vehicle while under the influence of intoxicating liquor." N.J.S.A. 39:4-50(a). That statute does not require a driver to be "'absolutely "drunk," in the sense of being sodden with alcohol.'" State v. Johnson, 42 N.J. 146, 164 (1964) (citation omitted). Rather, it addresses a "condition, short of intoxication," id. at 165, "which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway," State v. Bealor, 187 N.J. 574, 589 (2006) (citation omitted). All that is needed to convict is "a substantial deterioration or diminution of the mental

[2] The video shows plaintiff continued to argue and stagger after he was assaulted, but we find probable cause without needing to consider his post-assault behavior on the video.

faculties or physical capabilities . . . due to intoxicating liquor." Ibid. Probable cause requires "less than the proof needed to convict" for DWI. State v. Moskal, 246 N.J. Super. 12, 21 (App. Div. 1991).

Plaintiff exuded a strong odor of alcohol on his breath, his face was flushed, he slurred his words, and he was incoherent and belligerent. The video showed him driving erratically, walking unsteadily, and arguing repeatedly.

These common symptoms of intoxication gave probable cause that plaintiff was under the influence. Numerous cases have found probable cause based on some or all of these symptoms. See, e.g., Karins v. Atl. City, 152 N.J. 532, 559 (1998) (the driver "staggered, slurred his speech, and smelled of alcohol"); State v. Monaco, 444 N.J. Super. 539, 542, 548 (App. Div. 2016) (the driver drove up on the curb and had "the odor of alcoholic beverage," and slurred speech); Moskal, 246 N.J. Super. at 20 (the driver's "face was extremely flush and his eyes were drooping and red," there was "a strong odor of alcohol on his breath," and he admitted drinking); State v. Grant, 196 N.J. Super. 470, 474, 476 (App. Div. 1984) (the driver "had difficulty with his balance, his eyes were bloodshot, his face flushed and there was a strong odor of alcohol emanating from his breath"); see also State v. Morris, 262 N.J. Super. 413, 421-22 (App. Div. 1993) (finding "ample

evidence" to support conviction where the driver had "a strong odor of alcohol on his breath," his speech was slurred, and he became belligerent to the officers, and an officer felt he was intoxicated "without a doubt").[3]

Moreover, after speaking with and observing plaintiff, both Sergeant Shaw and Lieutenant Cassidy opined that plaintiff was under the influence "without a doubt," with Cassidy citing her years of experience in the narcotics unit detecting persons under the influence. In determining probable cause, "'the common and specialized experience and work-a-day knowledge of police [officers] must be taken into account.'" Wildoner, 162 N.J. at 390 (alteration in original) (citation omitted); see, e.g., State v. Corrado, 184 N.J. Super. 561, 564-65, 567 (App. Div. 1982); see also Bealor, 187 N.J. at 585. "The observations and opinion of experienced officers, having no reason to be biased against defendant, could reasonably be found persuasive[.]" Johnson, 42 N.J. at 166.[4]

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[3] "A defendant need not have displayed each and every one of these symptoms in order to be found guilty of an 'under the influence' violation." Richmond & Burns, N.J Municipal Court Practice § 25:5-2(a) at 608 (2017); see Johnson, 42 N.J. at 166-67.

[4] The observations by Shaw and Cassidy were later corroborated by the breathalyzer operator's report. Officer Sarmiento observed that even hours after the incident plaintiff still had the odor of alcohol on his breath, and his speech was boisterous, rambling,

Our Supreme Court has rejected "the proposition that a police officer who reasonably believes she has probable cause must conduct further investigation." Kirk, 109 N.J. at 188. Nonetheless, plaintiff complains he was not asked to perform field sobriety tests. However, as shown by the cases cited above, such testing is not required to establish probable cause. See, e.g., Karins, 152 N.J. at 559 (noting the officer "did not conduct a field sobriety test and did not charge Karins with DWI, but that does not mean that he lacked probable cause to do so"); Monaco, 444 N.J. Super. at 546, 548-49 (App. Div. 2016) (affirming the trial court's finding "that probable cause existed, even absent the field sobriety tests"); State v. George, 257 N.J. Super. 493, 496-97 (App. Div. 1992) (finding the "arrest was clearly justified" because the driver's "breath disclosed a heavy odor of alcohol" and he admitted drinking, even though he performed the field sobriety tests "without error"). Field sobriety tests simply allow an officer to look for "common factual indicia that a person is under the influence of intoxicating liquor," and here several such indicia had already been observed. State v. Morton, 39 N.J. 512, 515 (1963).

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and incoherent. Plaintiff told Sarmiento that he had no injury, and Sarmiento observed none. Because Sarmiento's observations occurred after arrest and were unknown to Captain Cowan, we do not rely on them to find Captain Cowan had probable cause.

The evidence presented by Captain Cowan was sufficient to establish probable cause. In any event, the evidence satisfied the "lesser standard" that "a reasonable police officer could have believed that probable cause existed." Schneider, 163 N.J. at 365. "It cannot be said as a matter of law that no reasonably competent officer would have believed that probable cause existed to charge plaintiff with [DWI]." Morillo, 222 N.J. at 108.

B.

"[O]nce [Captain Cowan] presented sufficient evidence in support of the motion" for summary judgment, namely the video and the certifications and reports of Shaw and Cassidy, plaintiff as "the opposing party must 'demonstrate by competent evidential material that a genuine issue of fact exists[.]'" Globe Motor Co. v. Iqdalev, 225 N.J. 469, 479-80 (2016) (citation omitted). "By its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill, 142 N.J. at 529 (citation omitted).

Plaintiff admitted the video accurately depicted the events at the BP station. In his deposition, plaintiff testified he had no reason to dispute anything in the reports of Shaw and Cassidy, or to believe they were biased against him. He admitted that he

was drinking before he drove to the BP station, and that he "had alcohol on [his] breath." He conceded he did not have any reason to dispute that his "words were slurred" or his "speech was rambling, incoherent and boisterous."[5]

Instead, plaintiff tries to create a genuine issue of material fact by citing evidence unknown to Shaw, Cassidy, and Captain Cowan. However, to determine whether "'[p]robable cause exists'" we look to "'"the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information"'" at the time of the arrest. Schneider, 163 N.J. at 361 (alterations in original) (citation omitted). Courts "'"consider the totality of the information available to the officer at the time of the conduct" to evaluate whether a constitutional defect exists. "Information acquired subsequently cannot be used to either bolster or defeat the facts known at the time."'" State v. Myers, 442 N.J. Super. 287, 294 n.2 (App. Div. 2015) (citation omitted). Similarly, courts addressing qualified immunity consider whether, given "the specific facts known by the official, he or she could reasonably believe that probable cause

[5] To the extent plaintiff's admissions in his deposition were contradicted by his general denials of Captain Cowan's statement of material facts, plaintiff failed to "specifically dispute[]" those facts or support his denials "by citation [to the motion record] demonstrating the existence of a genuine issue as to the fact." R. 4:46-2(b).

existed." Kirk, 109 N.J. at 186; see Schneider, 163 N.J. at 376.

Thus, plaintiff cannot defeat probable cause or qualified immunity by procuring, three years after the DWI incident, certifications from three officers who had been drinking with him at the tavern. Those officers were not at the BP station and the information in their certifications was unknown to Shaw, Cassidy, and Captain Cowan.

In any event, the certifications do not rule out that plaintiff was under the influence by the time he drove to, from, and back to the BP station after 3:15 a.m. Officer Thompson certified that he had a few beers with plaintiff until Thompson left at about 1:30 a.m., that "[a]t that time, [he] observed Mr. Lang to be sober and coherent," and that he "did not have any concerns about Mr. Lang operating a motor vehicle at that time." However, plaintiff remained at the tavern drinking for at least another hour. Officer Young said plaintiff did not appear to be intoxicated or engaging in belligerent behavior, but Young did not state when on June 9 he made those observations. Officer Keheller certified that "[w]hen he left the bar early in the morning hours of June 9, 2013, Mr. Lang did not appear to be intoxicated and definitely was not confrontational or belligerent in anyway," but Keheller similarly does not specify when early in the morning hours he made those observations.

Similarly, plaintiff cannot defeat probable cause or qualified immunity with a report signed six months after the incident regarding his doctor's visit four days after the incident. Plaintiff told the doctor he had a constant headache, dizziness, nausea, and difficulty concentrating after the assault, and the doctor diagnosed a "head concussion." However, Lieutenant Cassidy saw no sign of injury on plaintiff, and plaintiff rejected medical attention. Plaintiff conceded Cassidy, Shaw, and Captain Cowan had no information that he had a concussion, and testified he never requested medical care from any officer.

Plaintiff also cites a report generated almost three years after the incident by his DWI consultant, who conceded he could not consider "the evidence of concussion since the officer was not aware of same prior to arrest." Nonetheless, the consultant, who stated he was neither a legal expert nor a medical doctor, opined that materials from the "Advanced Roadside Impaired Driving Enforcement" class states "head trauma" may cause individuals to appear to be impaired by alcohol. However, there was no evidence any of the officers had taken that course, knew that information, or knew if plaintiff had head trauma. That was not clear from the video, and was contradicted by plaintiff's refusal of medical attention.

"A party cannot defeat a motion for summary judgment merely by submitting an expert's report in his or her favor. In order for such a report to have any bearing on the appropriateness of summary judgment, it must create a genuine issue of material fact." Brill, 142 N.J. at 544 (citation omitted). Whatever their relevance at a DWI trial to show plaintiff was not in fact under the influence, plaintiff's reports did not create a genuine issue of material fact about probable cause because they were based on subsequently-acquired information unknown to Cassidy, Shaw, and Captain Cowan. We must "reject plaintiff's attempt to view the probable cause determination through the harsh and unforgiving glare of hindsight." Brunson, 199 N.J. at 398.

Plaintiff next tries to create a genuine issue of material fact by citing the absence of other evidence of intoxication. However, the absence of additional evidence is irrelevant as the evidence known to Captain Cowan was sufficient to establish probable cause as well as qualified immunity.

Plaintiff cites that Captain Cowan testified in his deposition that when he arrived he "observe[d] Officer Lang" but "did not observe him stumbling" or observe any other symptoms of intoxication. However, Captain Cowan did not speak to plaintiff and there was no evidence he was in a position to detect any such

symptoms or see plaintiff walking. Nor did Captain Cowan claim to be relying on his own observation of plaintiff.

Plaintiff stresses that the reports of the first patrol officers to respond to the BP station did not mention that plaintiff was intoxicated.[6] However, the reports contained evidence of potentially intoxicated behavior by plaintiff. Officers Bustamente and Szymanski reported that they found plaintiff "having a verbal confrontation with a group of people" and that the officers had to separate plaintiff and the group. Officer Hennessey's report stated that plaintiff was "screaming excitedly," and that when the officers tried to calm plaintiff down "he kept on yelling that he was assaulted and he wanted the people arrested."

Plaintiff notes the patrol officers' reports did not indicate that the four customers said plaintiff was intoxicated. However, the reports contained the customers' numerous allegations of potentially intoxicated behavior by plaintiff, including being

[6] Those reports were submitted only by Chief Cowan in support of his summary judgment motion, and were not listed among the exhibits the trial court considered in ruling on Captain Cowan's motion. Were we to consider them, we would also have to consider the other evidence submitted only by Chief Cowan that supported probable cause, including Captain Cowan's testimony that Cassidy told him plaintiff was "drunk" and "highly intoxicated" and she had to get between Shaw and plaintiff "[d]ue to Officer Lang's belligerence with Sergeant Shaw."

disrespectful, arguing, and pushing the females. The male assailant told Lieutenant Cassidy that plaintiff "was harassing the group from the time they entered the convenience store," that plaintiff got "up in the [girls'] faces, real close to them," and that plaintiff denied being a police officer when asked.[7]

Thus, the patrol officers' reports contained further evidence that plaintiff was not in control of himself. If plaintiff's alcohol consumption "'tend[ed] to deprive him of that clearness of intellect and control of himself which he would otherwise possess,'" he was under the influence. Johnson, 42 N.J. at 165 (citation omitted). Thus, even assuming Captain Cowan was aware of what the patrol officers would later write in their reports, the reports added to and did not subtract from the already-sufficient evidence giving probable cause that plaintiff was under the influence.

In any event, plaintiff's opposition, based on subsequently-acquired information unknown to Captain Cowan, Cassidy, and Shaw, and the absence of other information, was immaterial as it did not alter that there was probable cause under "the facts known to [Captain Cowan] at the time." See Brill, 142 N.J. at 543

[7] The State alleges at least one of the customers' statements to police alleged plaintiff was "drunk," but that statement was not part of the summary judgment record.

(rejecting opposition to summary judgment based on facts which were "irrelevant"). Therefore, plaintiff's opposition failed to create a genuine issue of material fact undermining that there was probable cause, let alone that "a reasonable police official could have believed in its existence." Morillo, 222 N.J. at 119 (quoting Schneider, 163 N.J. at 360).

Plaintiff also argues that summary judgment was not possible because he claimed Captain Cowan was motivated by malice toward him. However, the issues of whether there was probable cause, or whether there was qualified immunity, "[b]oth require application of the objective reasonableness standard of the Fourth Amendment without regard to the law enforcement officer's underlying motive or intent." Schneider, 163 N.J. at 366. An arrest "is reasonable 'regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify [the arrest]. The officer's subjective motivation is irrelevant.'" State v. Brown, 205 N.J. 133, 146 (2011) (citations omitted). Similarly, the officer's "subjective beliefs about the [arrest] are irrelevant" to qualified immunity, for which "absence of malice" is not an element. Schneider, 163 N.J. at 354-55 (quoting Anderson, 483 U.S. at 641).[8]

[8] In any event, the trial court rejected his claims of malice as unsupported in granting summary judgment on other counts.

"[I]f the opposing party [contesting a summary judgment motion] offers . . . only facts which are immaterial or of an insubstantial nature," then "he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact." Brill, 142 N.J. at 529 (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954) (Brennan, J.)). As no genuine issue of material fact was shown by plaintiff or by the reports on which Captain Cowan relied, "the proper disposition is summary judgment." Ibid. (quoting Judson, 17 N.J. at 75).

C.

The trial court found the reports of Sergeant Shaw and Lieutenant Cassidy evidenced that plaintiff was under the influence, citing the odor of alcohol on his breath, and his slurred words, incoherent speech, and belligerence. The court acknowledged that plaintiff's deposition failed to contest some of these symptoms. The court noted the video showed plaintiff "exhibiting unusual and unexplained behavior." The court recognized that the certifications from the officers drinking with plaintiff in the tavern either were "not contemporaneous with plaintiff's driving to the BP station" or did not say precisely

when their observations were made. The court concluded the video and the reports of Shaw and Cassidy provided more evidence of intoxication than was found sufficient for probable cause in George. The court indicated that if believed, "the evidence of probable cause" was "overwhelming."[9]

Nevertheless, the trial court denied Captain Cowan summary judgment on the false arrest and malicious prosecution counts because it could not "determine the truthfulness of those reports and observations on the motion record." However, a trial "'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill, 142 N.J. at 540 (citation omitted). As plaintiff failed to raise a genuine issue of material fact, summary judgment should have been granted.

We recognize that when considering summary judgment, like a judgment notwithstanding a verdict,[10] trial courts may not usurp "the jury's task of assessing the credibility of the witnesses." Sons of Thunder v. Borden, Inc., 148 N.J. 396, 415 (1997).

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[9] In granting summary judgment to Chief Cowan, the trial court ruled: "Based on the undisputed material facts in the record, and excluding all facts not sufficiently supported or immaterial under the summary judgment standard, it can be reasonably inferred by this court that there was probable cause for plaintiff's arrest."

[10] "[T]he essence of the inquiry in each is the same." Brill, 142 N.J. at 536.

"[W]here men of reason and fairness may entertain differing views as to the truth of testimony, whether it be uncontradicted, uncontroverted or even undisputed, evidence of such a character is for the jury." Ibid. (quoting Ferdinand v. Agricultural Ins. Co. of Watertown, 22 N.J. 482, 494 (1956)); see Akhtar v. JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 399 (App. Div. 2015).

"However, credibility is not a jury question when testimony is reliable and uncontradicted." Johnson v. Salem Corp., 97 N.J. 78, 93 (1984). "'[W]here the uncontradicted testimony . . . is unaffected by any conflicting inferences to be drawn from it and is not improbable, extraordinary or surprising in its nature, or there is no other ground for hesitating to accept it as the truth, there is no reason for denying'" summary judgment. Ibid. (quoting Ferdinand, 22 N.J. at 498); see Strumph v. Schering Corp., 256 N.J. Super. 309, 324 (App. Div. 1992) (Skillman, J., dissenting), rev'd o.b. dissent, 133 N.J. 33 (1993).

Plaintiff conceded he had no basis to dispute the video or the reports of Sergeant Shaw and Lieutenant Cassidy. Their observations were not conflicting or improbable, nor was there any other ground for hesitating to accept their truth. Moreover, "courts have consistently held that another law enforcement officer is a reliable source and that consequently no special

showing of reliability need be made as part of the probable cause determination." 2 Wayne R. LaFave, Search & Seizure, § 3.5(a) at 332 & n.11 (5th ed. 2012); see, e.g., United States v. Ventresca, 380 U.S. 102, 111 (1965) ("Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."); State v. Gillman, 113 N.J. Super. 302, 305-06 (App. Div. 1971) ("the observations of fellow law enforcement officers constitute a reliable basis in the assessment of whether probable cause to arrest exists").

Accordingly, Captain Cassidy was "'reasonable in accepting the information as true.'" State v. Goodwin, 173 N.J. 583, 598 (2002) (citation omitted); see, e.g., Groman v. Twp. of Manalapan, 47 F.3d 628, 635 & n.10 (3d Cir. 1995) (ruling that summary judgment was appropriate as the arresting officers relied on information from another officer which was "sufficient for them to have believed probable cause existed," even if that officer's information was untrue).

The trial court also stated that "[t]he determination of probable cause is for the jury if there is a genuine issue of material fact for that jury to resolve." "[W]here there are disputed genuine issues of fact upon which the probable cause issue depends, then the issue of probable cause to arrest is a

question for the factfinder." Wildoner v. Borough of Ramsey, 316 N.J. Super. 487, 498 (App. Div. 1998), rev'd, 162 N.J. 375 (2000). However, "probable cause can be decided on summary judgment by the judge if 'no genuine issue as to any material fact' or 'credibility conflicts[ ]' exist." Tarus v. Borough of Pine Hill, 381 N.J. Super. 412, 426 (App. Div. 2005) (citations omitted), aff'd in part, rev'd in part on other grounds, 189 N.J. 497, 521 (2007).

In any event, qualified immunity should have been decided on summary judgment. "Qualified immunity 'is an immunity from suit rather than a mere defense to liability' [and] is effectively lost if the case is allowed to go to trial." Wildoner, 162 N.J. at 387 (citations omitted). Therefore, "the issue of qualified immunity is one that ordinarily should be decided well before trial, and a summary judgment motion is an appropriate vehicle for deciding that threshold question of immunity when raised. The issue is one for the court to determine." Morillo, 222 N.J. at 119 (citing Schneider, 163 N.J. at 355-56, 359). Even if there is no probable cause, "it is for the judge to 'decide whether the defendant has proven by a preponderance of the evidence that his or her actions

were reasonable under the particular facts.'" Morillo, 222 N.J. at 119 (quoting Schneider, 162 N.J. at 360).[11]

Thus, the "rule" is that the trial court should decide whether an officer has qualified immunity on summary judgment. Brown v. State, 230 N.J. 84, 98-99 (2017). The only exception is where a plaintiff raises a genuine issue regarding "the who-what-when-where-why type of historical fact issues." Id. at 99 (quoting Schneider, 163 N.J. at 359). As plaintiff failed to raise such a material issue of historical fact, the trial court should not have deferred the issue to the jury. "When no material historical or foundational facts are in dispute, . . . 'the trial judge must then decide the legal issue of whether probable cause existed and, if not, whether a reasonable police official could have believed in its existence.'" Morillo, 222 N.J. at 119 (quoting Schneider, 163 N.J. at 360).

The trial court expressed concern there was "no explanation on the record why [Jersey City] police officers allegedly 'failed

[11] Our Supreme Court has rejected the argument that "the question of objective reasonableness[] should be submitted to the jury." Schneider, 163 N.J. at 358. "A defendant's entitlement to qualified immunity based on objectively reasonable conduct 'is a question of law to be decided [as] early in the proceedings as possible, preferably on a properly supported motion for summary judgment or dismissal.'" N.E. ex rel. J.V. v. State Dep't of Children & Families, Div. of Youth & Family Servs., 449 N.J. Super. 379, 404 (App. Div. 2017) (quoting Wildoner, 162 N.J. at 387).

to cooperate' with the Weehawken Municipal Prosecutor" and failed to appear in court, and what efforts were made to compel their compliance with subpoenas. While non-cooperation by police officers with prosecutors and subpoenas is disturbing, it is no basis to deny summary judgment to Captain Cowan. If the officers in question were plaintiff's fellow patrol officers, their information was not the basis of Captain Cowan's decision to arrest or his summary judgment motion. There is no evidence Lieutenant Cassidy or Sergeant Shaw were subpoenaed and failed to appear or cooperate. Even if they did so, that would not create a genuine issue of material fact regarding whether Captain Cowan properly relied on their information under either a probable cause or qualified immunity analysis.

V.

Plaintiff claims that Captain Cowan was collaterally estopped from litigating whether there was probable cause because of the ruling of the Weehawken Municipal Court which found no probable cause and dismissed the criminal case.[12] However,

> "'[f]or the doctrine of collateral estoppel to apply to foreclose the relitigation of an issue, the party asserting the bar must show that: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the

[12] The Municipal Court did not view the surveillance video.

> court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.'"
>
> [N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 115 (2011) (citations omitted).]

"A fundamental tenet of collateral estoppel is that the doctrine cannot be used against a party unless that party either participated in or was 'in privity with a party to the earlier proceeding.'" State v. K.P.S., 221 N.J. 266, 277 (2015) (citation omitted). Captain Cowan was not a party in the criminal action, nor was he in privity to the State which prosecuted that action. "The concept of privity applies '"only when the party is a virtual representative of the non-party, or when the non-party actually controls the litigation."'" Id. at 278 (citations omitted). The State was not representing Captain Cowan, and there is no evidence he controlled the State's prosecution of the litigation. See id. at 278-79 (holding that co-defendants appealing the denial of their joint motion to suppress are not in privity). There was no evidence Captain Cowan had control of "the legal theories and proofs to be advanced [on] behalf of the party to the action [as well as] control over the opportunity to obtain review." Allen v. V & A Bros., Inc., 208 N.J. 114, 139 (2011) (quoting Restatement

(Second) of Judgments § 39 (Am. Law Inst. 1982)). Indeed, Captain Cowan was not even present at the suppression hearing.

Plaintiff argues the Weehawken municipal prosecutor represented the interests of Jersey City's Captain Cowan. Even assuming "[t]hat the parties may have similar interests in the outcome of the litigation," that "does not of itself establish privity of interest between them for purposes of issue preclusion." Stegmeier v. St. Elizabeth Hosp., 239 N.J. Super. 475, 487-88 (App. Div. 1990).

In any case, as the trial court found, collateral estoppel did not preclude consideration of qualified immunity, as that issue was not "'"identical to the issue decided in the prior proceeding,"'" or "actually litigated in the prior proceeding." R.D., 207 N.J. at 115 (citations omitted). As set forth above, qualified immunity involves a lesser standard than probable cause.

Finally, collateral estoppel "'will not be applied when it is unfair to do so.'" Allen, 208 N.J. at 138 (citation omitted). It would be unfair to apply it to Captain Cowan as he "'did not have an adequate opportunity to obtain a full and fair adjudication in the prior action,'" and "'could not have obtained review of the prior judgment.'" Ibid. (citation omitted). Thus, Captain Cowan was not precluded from arguing that his decision to arrest

plaintiff was supported by probable cause or protected by qualified immunity.

VI.

Thus, the trial court should have granted summary judgment because there was probable cause for plaintiff's arrest, and because a reasonable police officer could have believed there was probable cause in any event. As "probable cause is an absolute defense to an allegation of malicious prosecution or false arrest," Tarus, 189 N.J. at 521, and as qualified immunity immunized Captain Cowan from such claims regardless, the counts of plaintiff's complaint alleging false arrest and malicious prosecution should have been dismissed.[13] Accordingly, we reverse the trial court and remand for entry of summary judgment on those counts and dismissal of plaintiff's complaint.

Reversed and remanded. We do not retain jurisdiction.

[13] We need not reach Captain Cowan's argument that plaintiff also failed to show the malice required for malicious prosecution.