2/5/19

No. 18-1063

In the Supreme Court of the United States

JOHN COTTAM,
Petitioner

v.

DOUGLAS PELTON,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI

To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10094
IN RE: COTTAM v PELTON

Appeal from the United States District Court
for the Middle District of Florida
(September 10,2018)

Decided: 9/10/2018 (per curiam, unpublished)

Before JORDAN, NEWSOM, and JULIE CARNES, Circuit Judges.

[DO NOT PUBLISH] IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10094

Non-Argument Calendar

D.C. Docket No. 5:16-cv-00413-JSM-PRL

JOHN COTT AM,

Plaintiff-Appellant,

versus

CITY OF WILDWOOD, et al.,

Defendants,

DOUGLAS PELTON,
City of Wildwood Police Officer,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(September 10,2018)

Before JORDAN, NEWSOM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

John Cottam brought this action against Officer Douglas Pelton, asserting false arrest and malicious prosecution claims under 42 U.S.C. § 1983 and intentional and negligent infliction of emotional distress claims under Florida law after Cottam was stopped for speeding and arrested for "eluding," in violation of Fla. Stat. § 316.1935(2). The district court granted summary judgment in favor of Pelton, concluding (1) that Pelton was entitled to qualified immunity as to both of the § 1983 claims, (2) that Pelton's conduct while arresting Cottam was not sufficiently outrageous as to constitute intentional infliction of emotional distress, and (3) that Pelton was immune from liability for the negligent infliction of emotional distress claim under Fla. Stat. § 768.28(9)(a).

On appeal, Cottam argues that the district court erred in granting summary judgment because there were numerous disputed issues of material fact demonstrating that Pelton fabricated the eluding charge. After careful review, we affirm.[1]

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[1] We review a district court's entry of summary judgment *de novo*. *Hallmark Developers, Inc. v. Fulton Cty., Ga.*, 466 F.3d 1276, 1283 (11th Cir. 2006). Summary judgment is appropriate when the evidence presents no genuine dispute as to any material fact and compels judgment as a matter of law. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). A fact is material if it may affect the outcome of the suit under the governing law. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is genuinely in dispute if the record evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* Factual disputes that are unnecessary will

I

Qualified immunity protects government officials engaged in discretionary functions unless they violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. *Keating* v. *City of Miami,* 598 F.3d 753, 762 (11th Cir. 2010). To receive qualified immunity, "the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Kingsland v. City of Miami,* 382 F.3d 1220, 1232 (11th Cir. 2004). Here, Pelton was acting within the scope of his discretionary authority when he stopped and arrested Cottam. So the burden shifts to Cottam to show that qualified immunity should not apply because Pelton (1) violated a constitutional right and (2) that right was clearly established at the time of the incident. *Garczynski v. Bradshaw,* 573 F.3d 1158, 1166 (11th Cir. 2009). We may consider these two prongs in any order. *Pearson v. Callahan,* 555 U.S. 223,236 (2009).

A

An officer is entitled to qualified immunity against false-arrest claims if, based on the totality of the circumstances, the officer had arguable probable cause to effectuate the arrest. *Davis* v. *Williams,* 451 F.3d 759, 762-63 (11th Cir. 2006). Arguable probable cause exists where an objectively reasonable officer in the same circumstances and possessing the same knowledge as the arresting officer could

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not be counted. *Id.*

have believed that probable cause existed. *Thornton* v. *City of Macon,* 132 F.3d 1395, 1399 (11th Cir. 1998). Arguable probable cause is a lower standard than actual probable cause, and only requires that under all of the facts and circumstances, an officer reasonably could—but not necessarily would—have believed that probable cause was present. *Crosby v. Monroe Cty.*, 394 F.3d 1328, 1332 (11th Cir. 2004). Importantly, an arrest is lawful so long as there is probable cause to support an arrest for *any* offense, even if probable cause does not exist for the offense announced at the time of the arrest. *Lee v. Ferraro,* 284 F.3d 1188, 1196 (11th Cir. 2002).

Here, the district court properly granted summary judgment in favor of Pelton as to Cottam's false-arrest claim because Pelton had arguable probable cause to arrest Cottam for at least three offenses: (1) attempting to elude arrest, in violation of Fla. Stat. § 316.1935(1), (2) trespassing on private property, in violation of Fla. Stat. § 810.09(l)(a)(l), and (3) speeding, in violation of Fla. Stat. §316.189(1).

1

Fla. Stat. § 316.1935(1) provides that "[i]t is unlawful for the operator of any vehicle, having knowledge that he or she has been ordered to stop such vehicle by a duly authorized law enforcement officer, willfully to refuse or fail to stop the vehicle in compliance with such order or, having stopped in knowing compliance

with such order, willfully to flee in an attempt to elude the officer." To establish probable cause for an arrest under § 316.1935(1), the arresting officer must reasonably believe that the arrestee knew that he had been ordered to stop. *See Manners v. Cannella,* 891 F.3d 959, 970 (11th Cir. 2018). Based solely on Cottam's version of events, Pelton witnessed Cottam speed down the highway while Pelton pursued him with his lights flashing, and then witnessed Cottam turn onto a side road, drive past a public parking lot, drive past "no trespassing" and "do not enter" signs, enter into a restricted railroad area, and maneuver his car around barricades and onto the train tracks, before stopping his vehicle between the tracks. On these undisputed facts alone, an objectively reasonable officer could have believed that Cottam knew that he had been ordered to stop, but was attempting to elude arrest. Accordingly, Pelton had arguable probable cause to arrest Cottam for attempting to elude arrest in violation of Fla. Stat. § 316.1935(1).

2

Fla. Stat. § 810.09(1)(a)(l) provides that it is unlawful to willfully enter onto property with a notice against trespassing. In this case, the arrest scene photos show, and Cottam admits, that he drove past a "NO TRESPASSING" sign and entered onto private property. Moreover, Cottam does not raise any issues on appeal to counter this determination. Therefore, Pelton also had arguable probable

cause to arrest Cottam for trespassing on private property, in violation of § 810.09(l)(a)(l).

3

Finally, Fla. Stat. § 316.189(1) provides that it is unlawful for any person to exceed a posted speed limit. *Id.* Here, Cottam did not dispute that he was traveling more than 20 miles-per-hour over the posted speed limit. Although § 316.189(1) is only a misdemeanor, under Florida law, Pelton was entitled to perform a full custodial arrest. *See Durruthy* v. *Pastor,* 351 F.3d 1080, 1093 (11th Cir. 2003). Accordingly, Pelton also had arguable probable cause to arrest Cottam for speeding in violation of Fla. Stat. § 316.189(1).

* * *

Because even based solely on Cottam's version of events, Pelton had arguable probable cause to arrest Cottam under Fla. Stat. §§ 316.1935(1), 810.09(l)(a)(l), and 316.189(1), Cottam's assertions that Pelton fabricated other aspects of the eluding charge are immaterial. *See Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.").

B

To establish a malicious-prosecution claim under § 1983, a plaintiff must prove (1) the elements of common law malicious prosecution and (2) a violation of his Fourth Amendment right to be free from unreasonable seizures. *Kingsland,* 382 F.3d at 1234. Under the second prong, a § 1983 plaintiff must prove that he "was seized in relation to the prosecution, in violation of his constitutional rights." *Id.* at 1235. In the case of a warrantless arrest, this requires that the party was arraigned or indicted, not merely arrested. *Id.*

Here, Cottam was never arraigned or indicted, but was merely arrested. Accordingly, the district court properly granted summary judgment against Cottam's malicious-prosecution claim because Cottam was never seized in violation of his constitutional rights. *See id.*

Moreover, and in any event, Cottam's malicious-prosecution claim is precluded because, as already explained, Pelton had arguable probable cause to arrest Cottam. *See Black* v. *Wigington,* 811 F.3d 1259, 1267 (11th Cir. 2016) ("[TJhe presence of probable cause defeats a claim of malicious prosecution.").

II

Under Florida law, no government agent shall be personally liable for acts within the scope of his employment unless the government agent acted in bad faith or with a malicious purpose or in a manner exhibiting a wanton and willful

disregard of human rights, safety, or property. Fla. Stat. § 768.28(9)(a). The existence of probable cause contradicts any suggestion of malicious intent or bad faith. *Wood* v. *Kesler,* 323 F.3d 872, 884 (11th Cir. 2003).

A

To establish an intentional-infliction-of-emotional-distress claim under Florida law, the plaintiff must show that the defendant's conduct was intentional or reckless, was outrageous, and caused severe emotional distress. *Horizons Rehabilitation, Inc.* v. *Healthcare & Ret. Corp.,* 810 So. 2d 958, 964 (Fla. Dist. Ct. App. 2002). The standard in Florida for outrageous conduct—which is a question of law—is extremely high. *Metro. Life Ins. Co.* v. *McCarson,* 467 So. 2d 277, 278 (Fla. 1985). The plaintiff must show that the defendant's actions were "so extreme in degree as to go beyond all possible bounds of decency." *Von Stein v. Brescher,* 904 F.2d 572, 584 (11th Cir. 1990). An officer is never liable where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress. *McCarson,* 467 So. 2d at 279.

The district court properly granted summary judgment against Cottam's intentional-infliction-of-emotional-distress claim because Pelton's conduct while arresting Cottam was not sufficiently outrageous. *See Von Stein,* 904 F.2d at 584; *McCarson,* 467 So. 2d at 279. Moreover, because Pelton had arguable probable

cause to arrest Cottam, his conduct was not malicious or in bad faith; accordingly, he is entitled to immunity under Florida law. *See* Fla. Stat. § 768.28(9)(a).

B

To establish negligent-infliction-of-emotional-distress claim under Florida law (1) the plaintiff must suffer a physical injury, (2) the plaintiff's physical injury must be caused by the psychological trauma, (3) the plaintiff must be involved in some way in the event causing the negligent injury to another, and (4) the plaintiff must have a close personal relationship to the directly injured person. *Zell* v. *Meek,* 665 So. 2d 1048,1054 (Fla. 1995). Additionally, the plaintiff generally must demonstrate that the emotional stress suffered flowed from injuries sustained in an impact. *Fernander v. Bonis,* 947 So. 2d 584, 590 (Fla. Dist. Ct. App. 2007) (noting that there are exceptions to Florida's impact rule, but applying the rule to dismiss a negligent-infliction-of-emotional-distress claim alleging a false arrest).

Here, the district court's grant of summary judgment against Cottam's negligent-infliction-of-emotional-distress claim was proper. As an initial matter, Cottam has failed to show that his emotional stress was caused by injuries he sustained in an impact, or that he should otherwise be granted an exception from Florida's impact rule. *See id.* Furthermore, because Pelton had arguable probable cause to arrest Cottam, Pelton is again entitled to immunity under Florida law. *See* Fla. Stat. § 768.28(9)(a).

III

For the foregoing reasons, we conclude that Pelton is entitled to qualified immunity as to his § 1983 claims, and statutory immunity as to his state law claims. Accordingly, the district court's grant of summary judgment is affirmed.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

Case No: 5:16-cv-413-Oc-30PRL
JOHN COTTAM,
Plaintiff,
v.
DOUGLAS PELTON,
Defendant.

SUMMARY JUDGMENT ORDER

Decided: 12/8/2017

Before: JAMES S. MOODY, JR., DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

Case No: 5:16-cv-413-Oc-30PRL

JOHN COTTAM,
Plaintiff,
v.
DOUGLAS PELTON,
Defendant.

SUMMARY JUDGMENT ORDER

Plaintiff John Cottam sued Defendant Douglas Pelton, a Wildwood police officer who arrested Cottam in 2012. Pelton moves for summary judgment, arguing he has qualified immunity because he had probable cause to arrest Cottam. Cottam argues there are disputed facts because Pelton fabricated the charges against him and habitually lied about what occurred. The Court concludes the undisputed facts show Pelton is entitled to summary judgment because he had at least arguable probable cause to arrest Cottam.

UNDISPUTED FACTS

While some of what occurred on July 23, 2012—the day of Cottam's arrest—is unclear, the following material facts are undisputed:

Cottam, a dermatologist, was leaving his satellite office in Lady Lake and traveling to his home in Brandon around 4:00 p.m. Cottam's usual route home took him south on U.S. Highway 301 approaching Wildwood. Cottam missed a turn that would have taken him to Interstate 75, and decided to take an alternate route that led him through Wildwood.

Pelton was positioned in his patrol vehicle on the northbound side of U.S. 301 near the intersection of Clark Street. Pelton, using his rear and front radars, observed Cottam traveling south on U.S. 301 at 67 mph—the posted speed limit in the area was 40 mph. Pelton turned on his flashing lights and began pursuing Cottam. Fortuitously, one of Cottam's medical assistants, Sarah Akay, was also traveling home on U.S. 301. She observed Cottam speed by her and Pelton begin his pursuit with his flashing lights activated, but no siren. (The parties dispute whether the siren was activated during the pursuit.) Akay turned off U.S. 301 shortly after crossing a bridge just beyond Clark Street and can offer no more clarity about what transpired in the pursuit.

Cottam did not see Pelton pursuing him on U.S. 301 and continued on his alternate route. Cottam turned west on Oxford Street, passing a public parking lot. Cottam continued a short distance until Oxford ended at sets of railroad tracks where there was no crossing. He passed a "DO NOT ENTER" sign and a second sign that reads, "CSX Transportation PROPERTY NO TRESPASSING." He maneuvered around five concrete barriers in an attempt to get to the other side of the railroad tracks where Kilgore Street begins.[II] After crossing the first set of railroad tracks, Cottam says he saw Pelton's flashing lights for the first time and stopped while in between another set of railroad tracks.

Pelton approached Cottam's vehicle and began to place him under arrest for fleeing and eluding in

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[II] Kilgore Street turns into County Road 44A, which connects to State Road 44. State Road 44 then connects to Interstate 75.

violation of § 316.1935(2), Florida Statutes, a third-degree felony. That statute provides as follows: Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 316.1935(2), Fla. Stat. (2012). Three other Wildwood police officers arrived on the scene—two coming from the Kilgore side of the railroad tracks—as Pelton was placing Cottam under arrest. Cottam spent a few hours in jail, and then was released on bond.

Cottam was subsequently prosecuted by the State for the fleeing and eluding.[III] But in January of 2013, the State voluntarily reduced the charge from fleeing and eluding to reckless driving. [IV] Cottam's criminal defense attorney moved to dismiss the reckless driving charge, arguing that there was no evidence Cottam operated his vehicle in a manner that endangered persons or property. The court dismissed the charge. Cottam never appeared in Court or had other significant pretrial restrictions placed on him.

PROCEDURAL HISTORY

In 2016, Cottam, proceeding *pro se*, filed this lawsuit against Pelton. He also sued other

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[III] The charge was brought in the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Sumter County, in case 2012-CF-000503-A.

[IV] The reduced charge was brought in the County Court of the Fifth Judicial Circuit of Florida, in and for Sumter County, in case 60-2013-CT-000059-A.

individuals, including Pelton's supervisors, the City of Wildwood, several assistant state attorneys, and a Florida Department of Law Enforcement agent. The Court dismissed the counts against all Defendants except Pelton. In the operative Complaint (Doc. 70), Cottam alleges the following counts against Pelton: False Arrest (Count I), malicious prosecution (Count II), intentional infliction of emotional distress (Count IV), and negligent infliction of emotional distress (Count V). The first two counts are brought as 42 U.S.C. § 1983 actions, while the last two are brought as state law claims.

SUMMARY JUDGMENT STANDARD

Motions for summary judgment should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (internal quotation marks omitted); Fed. R. Civ. P. 56(c). The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The substantive law applicable to the claimed causes of action will identify which facts are material. *Id.* Throughout this analysis, the court must examine the evidence in the light most favorable to the nonmovant and draw all justifiable inferences in its favor. *Id.* at 255.

Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, whether or not accompanied by

affidavits, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories and admissions on file, and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. The evidence must be significantly probative to support the claims. *Anderson,* 477 U.S. at 248-49.

This Court may not decide a genuine factual dispute at the summary judgment stage. *Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir. 1990). "[I]f factual issues are present, the Court must deny the motion and proceed to trial." *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983). A dispute about a material fact is genuine and summary judgment is inappropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir.1990). However, there must exist a conflict in substantial evidence to pose a jury question. *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1045 (11th Cir. 1989).

DISCUSSION

The Court concludes Pelton is entitled to summary judgment in his favor. Before addressing the reasons why, though, the Court provides a short primer to address some of the concerns voiced by Cottam.

To summarize Cottam's argument, Pelton is a liar who fabricated evidence against him. Reliance on the fabricated evidence caused the State to criminally prosecute Cottam, thus putting his medical license and livelihood in danger. And while the charge against him was dismissed—which he seems to equate with absolution from any wrongdoing—Cottam was not satisfied. He wanted Pelton held

accountable for his alleged abuse of power. He asked the Wildwood Police Department to do so, and it refused. He asked the Florida Department of Law Enforcement to do so, and it refused. He then asked the State Attorney's Office to do so, and it refused. And now, by focusing so much of his time in this case on trying to prove Pelton lied, it appears he wants this Court to do what the agencies did not: hold Pelton accountable.

While the Court certainly does not condone lying, it sees scant evidence that the officer here lied. Because he could have charged Cottam with several offenses—including fleeing and eluding—on the facts Cottam admits, there was no reason for Pelton to lie. The Court understands this does little to salve Cottam's grievance. But as the Eleventh Circuit recently explained, "The satisfaction of individual grievances must be balanced against the societal harm that would result from allowing lawsuits to proceed against public servants unchecked." *Hammett v. Paulding Cty.*, No. 16-15764, 2017 WL 5505114, at *6 (11th Cir. Nov. 17, 2017).

Because of the required balancing of interests, the Court concludes many of the issues Cottam spends so much time arguing are immaterial. As explained below, whether Pelton had his siren on is immaterial to whether he is entitled to qualified immunity for false arrest because Pelton had probable cause to arrest Cottam for other offenses. Regardless of whether Pelton fabricated evidence used to prosecute him, Cottam is unable to satisfy the requirements for malicious prosecution because he was not "seized" after his initial arrest. And while Cottam may have been distressed by Pelton's actions, the actions were not so outrageous as to allow Cottam to pursue an

intentional or negligent infliction of emotional distress claim.

A. Pelton Is Entitled to Summary Judgment on § 1983 Claims

Pelton is entitled to summary judgment on the false arrest and malicious prosecution counts because he has qualified immunity. Qualified immunity protects government officials engaged in discretionary functions unless they violate "clearly established federal statutory or constitutional rights of which a reasonable person would have known." *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010) (quotation marks and brackets omitted). So qualified immunity shields from liability "all but the plainly incompetent or one who is knowingly violating the federal law." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). At the summary judgment stage, courts view the facts from the plaintiff's perspective because the determinative issue is "not which facts the parties might be able to prove, but, rather, whether or not certain given facts" demonstrate a violation of clearly established law. *Santana v. Miami-Dade Cty.*, No. 15-14338, 2017 WL 2191468, at *4 (11th Cir. May 17, 2017).

"To receive qualified immunity, 'the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.' " *Kingsland v. City of Miami*, 382 F.3d 1220, 1232 (11th Cir. 2004). Once a defendant demonstrates he was acting within the scope of his discretionary authority, "the burden then shift[s] to the [plaintiff] to show that qualified immunity should not apply because: (1) the [official] violated a constitutional right, and (2) that right was clearly established at the time of the incident."

Garczynski v. Bradshaw, 573 F.3d 1158, 1166 (11th Cir. 2009).

Here, Pelton was acting within the scope of his discretionary authority when he stopped and arrested Cottam. So the burden shifts to Cottam to demonstrate that Pelton violated Cottam's constitutional rights and that the rights were "clearly established ... in light of the specific context of the case, not as a broad general proposition[,]" at the time of the actions. *Saucier v. Katz*, 533 U.S. 194, 201, (2001), *overruled in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009).

1. **False arrest claim**

As an initial matter, the Court notes that Cottam does not contest the validity of the traffic stop. He admits that he was speeding and that Pelton had the authority to stop him and issue him a speeding citation without violating Cottam's clearly established constitutional rights. So Cottam's false arrest claim hinges on the arrest itself.

"A warrantless arrest without probable cause violates the Constitution and provides a basis for a section 1983 claim. The existence of probable cause at the time of arrest, however, constitutes an absolute bar to a section 1983 action for false arrest." *Kingsland*, 382 F.3d at 1226 (internal citations omitted). "In the context of a claim for false arrest, an officer is entitled to qualified immunity where that officer had 'arguable probable cause' " to effectuate the arrest. *Davis v. Williams,* 451 F.3d 759, 762-63 (11th Cir. 2006). "Arguable probable cause exists where an objectively reasonable officer in the same circumstances and possessing the same knowledge as the officers effectuating the arrest could have believed that probable cause existed." *Williams v. Sirmons*,

307 F. App'x 354, 358 (11th Cir. 2009) (citing *Thornton v. City of Macon,* 132 F.3d 1395, 1399 (11th Cir. 1998)).

When considering arguable probable cause in a false arrest claim, "an arrest may be for a different crime from the one for which probable cause actually exists...." *Wilkerson v. Seymour*, 736 F.3d 974, 979 (11th Cir. 2013). In other words, "arguable probable cause to arrest for *some* offense must exist in order for officers to assert qualified immunity from suit." *Id.* (italics in original); *see also Reid v. Henry Cty., Ga.*, 568 F. App'x 745, 749 (11th Cir. 2014) (holding, "As long as probable cause existed to arrest the suspect for any offense, the arrest and detention are valid even if probable cause was lacking as to some offenses, or even all announced charges."). The Court concludes Pelton had probable cause or, at the very least, arguable probable cause to arrest Cottam for four offenses.

First, Pelton had probable cause to arrest Cottam for fleeing and eluding in violation of § 316.1935, Florida Statutes, albeit under a different subsection. Subsection (1) provides as follows:

It is unlawful for the operator of any vehicle, having knowledge that he or she has been ordered to stop such vehicle by a duly authorized law enforcement officer, willfully to refuse or fail to stop the vehicle in compliance with such order or, having stopped in knowing compliance with such order, willfully to flee in an attempt to elude the officer, and a person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 316.1935(1), Fla. Stat. (2012).[V] So unlike the subsection under which Cottam was charged,[VI] § 316.1935(1) does not require Pelton to have had his siren activated.

Based on Pelton's observations, he had arguable probable cause to believe Cottam violated § 316.1935(1). Pelton pursued Cottam down U.S. 301 with his flashing lights activated. As he approached Cottam, who claims he had slowed down approaching his turn on Oxford Street, Pelton observed Cottam pass a public parking lot at which he could have stopped. Pelton then observed Cottam pass a "DO NOT ENTER" sign and a "NO TRESSPASSING" sign before maneuvering around barricades and attempting to cross railroad tracks.[VII] Based on these

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[V] Although it is a third-degree felony just like the offense with which Cottam was charged, this subsection is considered a lesser-included offense of subsection (2). *Slack v. State*, 30 So. 3d 684, 687-88 (Fla. Dist. Ct. App. 2010).

[VI] The Court concludes there is a disputed issue of material fact as to whether Pelton had arguable probable cause to arrest Cottam under § 316.1935(2). The Court notes that although Pelton testified he had activated his siren, neither Akay nor Cottam heard the siren and it is not audible in the audio logs. But that is not enough to say Pelton fabricated this fact. It is possible that Pelton had his siren activated at some point during the pursuit after he passed Akay but before Cottam observed Pelton. And this could have been at a time when Pelton was not transmitting over the radio. If that was the case, Pelton would have had probable cause under subsection (2) because Florida law does not require Pelton to have had his siren activated for the entirety of the pursuit. *See Dupler v. Hunter*, No. 3:16-CV-191-J-34MCR, 2017 WL 3457032, at *8 n.12 (M.D. Fla. Aug. 11, 2017) (explaining that even a "quick siren" is sufficient to satisfy the probable cause inquiry under § 316.1935(2), Fla. Stat.).

[VII] Although Cottam claims to have stopped as soon as he

observations, Pelton had at least arguable probable cause to arrest Cottam for fleeing and eluding.

Second, Pelton had probable cause to arrest Cottam for trespassing on property other than a structure or conveyance, in violation of § 810.09(1)(a)(1), Florida Statutes, a first- degree misdemeanor. There was a posted "NO TRESPASSING" sign before the railroad tracks. Pelton observed Cottam pass the sign, enter upon CSX property, and maneuver around concrete barriers before stopping between the railroad tracks. Although Cottam claims he did not see the sign because he was looking for trains, Cottam's personal observations are irrelevant as to whether Pelton had arguable probable cause to arrest Cottam for committing a first-degree misdemeanor in his presence. So the Court concludes Pelton had at least arguable probable cause to arrest Cottam for trespassing.

Third, Pelton had probable cause to arrest Cottam for interference with a railroad track in violation of § 860.09, Florida Statutes, a third-degree felony. The statute provides, Any person, other than an employee or authorized agent of a railroad

company acting within the line of duty, who knowingly or willfully moves, interferes with, removes, or obstructs any railroad switch, bridge, track, crossties, or other equipment located on the right-of-way or property of a railroad and used in railroad operations is guilty of a felony of the third

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saw Pelton, that is irrelevant. It does not matter whether Cottam was actually attempting to flee from Pelton; the relevant inquiry is whether a reasonable officer in Pelton's shoes could have believed Cottam was attempting to flee.

degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 860.09, Fla. Stat. (2012). Pelton observed Cottam navigate his car between two railroad tracks and stop his vehicle, obstructing the use of the tracks. Pelton testified in his civil deposition that he believed he could have arrested Cottam for violation of this statute, but chose not to do so. Based on his observations, the Court concludes Pelton had at least arguable probable cause to arrest Cottam for interference with a railroad track.

Finally, the Court concludes Pelton had probable cause to arrest Pelton for speeding, in violation of § 316.189(1), a non-criminal traffic violation. Pelton observed Cottam traveling 67 mph in an area where the speed limit was 40 mph, which Cottam concedes. Although a non-criminal offense, the Eleventh Circuit has held that officers are permitted to make custodial arrests for non-criminal offenses in Florida, specifically for violations of Chapter 316, Florida Statutes. *See Sebastian v. Ortiz*, No. 16-20501-CIV, 2017 WL 4382010, at *5 (S.D. Fla. Sept. 29, 2017) (listing several Eleventh Circuit cases holding officers had probable cause to make arrests for non-criminal violations of Chapter 316). So the Court concludes Pelton had probable cause to arrest Cottam for speeding.

So regardless of whether Pelton had probable cause or arguable probable cause to arrest Cottam for fleeing and eluding in violation § 316.1935(2), the Court concludes even Cottam's version of the facts show Pelton had probable cause to arrest Cottam for *an* offense. And that is enough to entitle Pelton to qualified immunity for false arrest. So Pelton is entitled to summary judgment on this claim.

2. **Malicious prosecution claim**

"To establish a federal malicious prosecution claim under § 1983, a plaintiff must prove (1) the elements of the common law tort of malicious prosecution, and (2) a violation of [his] Fourth Amendment right to be free from unreasonable seizures." *Kingsland*, 382 F.3d at 1234.

As to the first prong, Florida law requires Cottam to prove six elements to support his malicious prosecution claim:

(1) an original judicial proceeding against the present plaintiff was commenced or continued; (2) the present defendant was the legal cause of the original proceeding; (3) the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff; (4) there was an absence of probable cause for the original proceeding; (5) there was malice on the part of the present defendant; and (6) the plaintiff suffered damages as a result of the original proceeding.

Id. The presence of probable cause defeats a claim of malicious prosecution. *Black v. Wigington*, 811 F.3d 1259, 1267 (11th Cir. 2016).

As to the second prong, Cottam must prove he was "seized" in relation to the prosecution. As the Eleventh Circuit explained in *Kingsland*,

Kingsland bears the burden of proving that she was seized in relation to the prosecution, in violation of her constitutional rights. In the case of a warrantless arrest, the judicial proceeding does not begin until the party is arraigned or indicted. Thus, the plaintiff's arrest cannot serve as the predicate deprivation of liberty because it occurred prior to the time of arraignment, and was not one that arose from

malicious prosecution as opposed to false arrest.

382 F.3d at 1235. "Thus, in addition to the common law elements, a § 1983 plaintiff must prove that he was 'seized in relation to the prosecution, in violation of [his] constitutional rights.'" *Donley v. City of Morrow, Georgia*, 601 F. App'x 805, 813 (11th Cir. 2015) (quoting *Kingsland*, 382 F.3d at 1235) (alteration in original). "Normal conditions of pretrial release, such as bond and a summons to appear, do not constitute a seizure violative of the Fourth Amendment, 'barring some significant, ongoing deprivation of liberty, such as restriction on the defendant's right to travel interstate.'" *Bloom v. Alvereze*, 498 F. App'x 867, 875 (11th Cir. 2012).

Cottam's malicious prosecution claim fails for three reasons. First, as explained above, Pelton had probable cause to arrest Cottam. The admitted facts show that Pelton had probable cause to arrest and charge Cottam with third-degree fleeing and eluding under § 316.1935(1). So while there is a factual dispute as to whether Pelton had his siren on as required under § 316.1935(2), the Court concludes the undisputed facts show Pelton had probable cause to arrest and charge Cottam with fleeing and eluding, thus entitling Pelton to qualified immunity.

Second, Cottam cannot prove damages resulting from the allegedly malicious prosecution. This is not the traditional case where charges were fabricated and the plaintiff could not have been prosecuted for an offense of the same magnitude but-for the fabrication. Here, Cottam was prosecuted for third-degree fleeing and eluding under § 316.1935(2). The Court has already concluded that Pelton had probable cause to arrest and charge Cottam with third-degree fleeing and eluding under § 316.1935(1). So even if Pelton

fabricated facts to support the fleeing and eluding charge under subsection (2), the facts to which Cottam admits would have allowed the same prosecution to take place under subsection (1), a lesser-included offense with the same potential penalties. The Court concludes, therefore, that Cottam could not have been damaged because the same prosecution could have occurred regardless of Pelton's allegedly wrongful acts.[VIII]

Third, the record evidence shows Cottam was not "seized" in violation of his Fourth Amendment rights in relation to the prosecution. In his deposition, Cottam explained that he spent a few hours in jail but was not arraigned during that time. After that, Cottam boasts that the charge against him was dismissed even though, "I never saw a judge in the entire case, never saw a jury in the entire case, never said one word in the entire case." (Doc. 1198, 128:3-5). By his own testimony, Cottam was never subjected to a Fourth Amendment seizure once the prosecution began. So the Court concludes Pelton is entitled to summary judgment on the malicious prosecution claim even if he is not entitled to qualified immunity.

B. Pelton is Entitled to Summary Judgment on State Law Claims

The Court concludes that Pelton is also entitled to summary judgment on Cottam's claims for intentional infliction of emotional distress and negligent infliction of emotional distress. The basis for these claims in the

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[VIII] The Court will not speculate as to why the State Attorney's Office reduced the charge to reckless driving instead of fleeing and eluding under subsection (1). Suffice to say, the Court concludes there are many reasonable bases for the decision that do not imply a conspiracy against Cottam.

operative Complaint is that Pelton "knew, or should have known, that fabricating a felony criminal charge and then intentionally arresting and prosecuting the Plaintiff on that fabricated felony charge ..would constitute intentional or negligent infliction of emotional distress. (Doc. 70,76 and 81). The undisputed facts, though, show Cottam cannot succeed on either claim.

As to the intentional infliction of emotional distress claim, Cottam was required to show that that Pelton's actions were "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency." *Von Stein v. Brescher*, 904 F.2d 572, 584 (11th Cir. 1990). The standard in Florida for outrageous conduct—which is a question of law—is extremely high. *Foreman v. City of Port St. Lucie*, 294 F. App'x 554, 557 (11th Cir. 2008) (citing *Metropolitan Life Ins. Co. v. McCarson,* 467 So.2d 277, 278 (Fla. 1985)). Pelton's actions of intentionally arresting and charging Cottam with a felony were not so outrageous to establish a claim for intentional infliction of emotional distress because Pelton had probable cause to arrest and charge Cottam for third-degree fleeing and eluding, under § 316.1935(1). So the Court concludes these acts do not meet the exacting standard required for outrageous conduct under Florida law.

Turning to the negligent infliction of emotional distress claim, the Court concludes Pelton is entitled to immunity under § 768.28(9)(a), Florida Statutes. The statues provides that no government agent (which includes Pelton) shall be personally liable for acts within the scope of his employment unless the government agent "acted in bad faith or with malicious purpose or in a manner exhibiting wanton

and willful disregard of human rights, safety, or property." § 768.28(9)(a), Fla. Stat. (2012). So a claim alleging negligent infliction of emotion distress—which necessarily precludes intentional bad faith or malicious acts—will not lie.

CONCLUSION

Pelton is entitled to summary judgment on all claims. While there is a dispute about certain facts—whether Pelton had his siren on at some point in the pursuit, whether Pelton called over the radio that Cottam was fleeing, and whether Pelton observed Cottam look at him in his rear-view mirror, *et cetera*—those facts are immaterial. The undisputed facts show Pelton had probable cause to arrest and charge Cottam with several offenses. The undisputed facts show Cottam was never seized, in violation of his constitutional rights, related to his prosecution. The undisputed facts show Pelton's act of arresting and charging of Cottam did not rise to the level of outrageous conduct under Florida law. And the undisputed facts show that Pelton is entitled to sovereign immunity as a governmental agent for his alleged negligent acts that caused Cottam emotional distress. So Pelton is entitled to summary judgment in his favor.

Accordingly, it is ORDERED AND ADJUDGED that:

1.Defendant's Motion for Summary Judgment (Doc. 119) is GRANTED.

2. The Clerk is directed to enter a Final Judgment in favor of Defendant Douglas Pelton and against Plaintiff John Cottam on all counts.

3. All pending motions are denied as moot.

4. The Clerk is directed to close this file.

DONE and **ORDERED** in Tampa, Florida, this 8th day of December, 2017.

JAMES S. MOODY, JR. UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel/Parties of Record

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10094
IN RE: COTTAM v PELTON

Appeal from the United States District Court
for the Middle District of Florida
(September 10,2018)

Request for *en banc* Hearing.
Denied.

Decided: 9/6/2018

Kevin C. NEWSOM Circuit Judge.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10094-JJ

JOHN COTTAM,
Plaintiff-Appellant,

Versus

CITY OF WILDWOOD} et al
Defendants,

DOUGLAS PELTON,
City of Wildwood Police Officer,
Defendant-Appellee

Appeal from the United States District Court
for the middle District of Florida

ORDER:

An *en banc* hearing can be ordered when (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. Fed R. App. P. 35 (a). Because this appeal does not satisfy either criteria, appellant's motion for initial hearing *en banc* is DENIED.

UNITED STATES CIRCUIT JUDGE
Kevin C. Newsom

APPENDIX D

EXCERPTS FROM DOCUMENTS

I Excerpts from Pelton's answers to Cottam's Request For Admissions (RFA):

Item 45, Page 9:

"45. The officer in the car that got in front of Plaintiff filed a report regarding this act of heading the Plaintiff off (hereafter referred to as "this act".).

RESPONSE: Denied.
Sgt. Pelton prepared the arrest report. Again, Sgt. Pelton does not know why Plaintiff decided to stop on the tracks or how far Plaintiff was willing to go to elude law enforcement, and therefore **cannot speculate as to whether Plaintiff stopped due to approaching law enforcement vehicles**."

II Excerpts from Pelton's answers to Cottam's Interrogatories:

Page 2, item #4:

4. Describe exactly how other Wildwood (WW) Police officers aided in stopping Plaintiff from eluding, and who the officer(s) was.

ANSWER:
I have no personal knowledge as to whether the Wildwood Police Officers who arrived on scene **had**

an effect on Plaintiff's decision to stop fleeing. But I believe that **when other patrol vehicles were approaching** the railroad tracks on which Plaintiff was trespassing, Plaintiff may have realized **he would not be able to continue to flee**."

Page 3, item #6:

"6. Identify all police cars and who was in them in the pictures taken by you at the scene after the Plaintiff was stopped, and which car got in front of Plaintiff to stop him from eluding.

ANSWER:

The patrol officers depicted in the photographs I took of the arrest scene were Officer J. Kelly; Officer C. Smalt; and Officer J. Torminades. **I do not know which vehicle** Plaintiff saw that may have **made him discontinue his efforts to flee**."

Page 14, Item #79:

79. Defendant Pelton asked Officer Smalt how Officer Smalt could say completely opposite things related to another car heading Plaintiff off.

RESPONSE:

Denied. Sgt. Pelton and Officer Smalt's testimony do not conflict.

III Excerpts from Pelton's Deposition:

STATE OF FLORIDA
VS .
JOHN ARTHUR COTTAM
DEPOSITION OF: DOUGLAS PELTON

DATE: OCTOBER 15, 2012

PLACE; OFFICE OF STATE ATTORNEY
323 LAWRENCE STREET
BUSHNELL, FL 33513

ALLAN KAYE, ESQ.

4809 SW 91ST TERRACE GAINESVILLE, FL 32608

ED MCDONOUGH, ESQ.
ASSISTANT STATE ATTORNEY BUSHNELL, FLORIDA

COURT REPORTER: CASEY LEWIS

INDEX

DIRECT EXAMINATION BY; MR, KAYE:
Page 7

Q. And when it passed you, did you take off after the car?

A- I did.

Q. Did you put your lights and siren on?

A. I did.

Page 8

Q. Okay. Were there any other cars on the road at the time?

A. I didn't make note of any other vehicles.

Q. Okay. So, you don't remember having to pass anybody to catch up with the car?

A. No, Sir.

Q. Okay. And then what happened?

A. As I was approaching the vehicle from the rear, I was, of course, observing the driver. Because I became concerned that it appeared that he was trying to elude me. And I was able to actually see the driver looking at me in his rear view mirrors,

Q. Approximately how far were you from the car at

Page 9

that time when you were able to see the driver?

A. At that point I would estimate probably a hundred feet.

Q. Okay. And you saw the driver. What did you see when you saw the driver in the mirror?

A. That he was looking in his mirror to the back. I could actually see him looking at me. Looking at the vehicle with the lights and sirens.

Q. Okay. And then what happened?

A. Then the driver made an exctremely abrupt right turn onto a little segment of the road called Oxford Street.

Page 10

Q. And did he at some point in time stop His Vehicl?

A. There was another patrol officer coming from the Opposite direction on the other side of the tracks And yes he stopped then.

Page 11

Q. Okay.
A . I was calling it out.
Q, When I read your report I didn't see anything regarding any other officers at the scene?
A, I only do my report as to what I observe, what my portion of it is. Whether or not a supervisor or that other officer completes a supplement report is not my responsibility.
Q. No but you didn't even say anything about any other officers being there.
A. I've got them listed.

MR. KAYE(CONTINUING)

Q. You don't remember which one of the officers was coming in the other direction?
A. No, Sir.
Q. Did he have his lights and siren on?
A. I don't recall.
Q. When did you notice that other officer?
A. I was not paying attention to the other officer. I was paying attention to the vehicle in front of me.

Page 13

Q. -you say there is three officers. Were the other three officers on the scene?
A. It was simultaneous. I was calling out a vehicle was not stopping.
Q. Okay. So, you--

A. -I did not document each individual officers—

Page 14
Q. -you notified dispatch?
A. Correct.

Q. That you were in a pursuit of a vehicle?
A. That a vehicle was not stopping.

Q. That the vehicle would not stop. Okay, Go ahead. I'm sorry.

Page 16

Q. Okay. And approximately how long did you follow Doctor Cottam from the time that you pulled out behind him until the time that he stopped?
A. The entire time.

Q. Okay.
A. I never lost sight of the vehicle,

Q. How long had you followed Doctor Cottam before you observed him looking in his rear view mirror at you?
A_ I was approximately at the intersection of County Road four sixty-six A when I could see him looking back at me. That's a~-

Q. Okay.
A. So, right there. It was obvious right here to me that he was looking back at me.

Q. And at what point in time was he still accelerating?
A. He was accelerating almost all the way to the point where he made his extremely abrupt, reckless right turn onto Oxford Street.

Q. I have no further questions.
MR. MCDONOUGH: No questions

IV Excerpts from Officer Smalt's Deposition:

DECEMBER 20, 2012

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN 4 AND FOR SUMTER COUNTY, FLORIDA.

6 CASE NO.

14 STATE OF FLORIDA

16 VS.

18 COTTAM

24 DEPOSITION OF: CHRIS SMALT

27 DATE: . DECEMBER 20, 2012

FLORIDA

37 ED MCDONOUGH, ESQ.

38 ASSISTANT STATE ATTORNEY

39 BUSHNELL, FLORIDA

3

5 DIRECT EXAMINATION BY: MR. KAYE:

8 Q. State your name, please?

9 A. My name is Chris Smalt.

10 Q. Officer Smalt, what department are you with?

11 A. Wildwood Police Department.

14 Q. Do you recall responding 15 to a traffic stop of a Lexus on the railroad tracks?

16 A. Yes.

17 Q. Can you tell me what you recall about that? Did 18 you do a report?

19 A. I didn't. To be honest with you, no, I didn't do 20 any report at all because I didn't realize he had listed 21 me in this until I got this.

22 Q. I got you?

23 A. Really the only thing I did was he had called out 24 on the radio that the car——I don't remember the exact

25 words. It was something to the affect that the car wasn't

5

1 stopping.

2 Q. Okay.

3 A. I happened to be in the area

6 Q. Right.

7 A. And I heard him say that the car

turned. And 8 where that car turned and went over the railroad tracks, 9 Kilgore and Mills intersect. So, I basically pulled in

10 from that direction. I got out and Pelton had 12 pretty much——officer Pelton pretty much already had him 13 out of the car——

14 Q. —but the stop, let me just stop you for just one 15 second. As I understand it, by the time you got there, 16 the stop had already happened and the individual was out

17 of the car? Or being taken out of the car by the officer?

18 A. Yes, Sir.

19 Q. Okay. So, he didn't stop because he saw you, or 20 you didn't block his car from going?

21 A. He was already stopped.

22 Q. Okay. And you don't recall exactly what the 23 officer said on the over the air?

24 A. Not exactly. I remember it was something to the 25 affect that he felt that the car wasn't stopping. I don't 6

1 know the exact verbiage. Something to that affect.

2 Q. Did you hear any conversation between officer 3 Pelton and Doctor Cottam? 5 A. 6 I mean, when I got out of my car officer Pelton was 7 walking him back to his car. I think I heard him tell him 8 he was going to be arrested for eluding a police officer.

9 But other than that, I really don't recall.

25 Q. Okay. None of the officers were there

before you 1 got there besides officer Pelton?

2 A. As I recall, yeah. It was just the suspect 3 vehicle, Pelton, and then me and Kelly pulled up pretty 4 much from the same direction.

6 Q. Alright. Both of your lights and sirens on? Or 7 did you just pull up?

8 A. I just pulled up. It 9 was pretty much over. Pelton was already getting him out 10 of the car.

22 Q. Okay. If you heard it, would you have recalled 23 it?

24 A. To be really honest with you, probably not. Like 25 I said, this case was really not——I mean, I just showed up 8

1 to make sure it was okay.

CROSS EXAMINATION

5 BY MR. MCDONOUGH:

6 Q. You mentioned that you had actually heard officer 7 Pelton on the line saying that he was fleeing and 8 eluding——

9 A. —I recall him saying something to that affect. I

10 cannot tell you the verbiage. Generally Pelton does a lot 11 of traffic stop. Pelton is our traffic person and is 12 usually pretty intent to what he's putting over the radio.

13 **If he didn't then I apologize**. I just for some reason I 14 thought I heard him say something to that affect.

15Q. Okay. No more questions.

V Excerpts from Ms. Tanner's Deposition:

1

1 IN THE CIRCUIT COURT OF THE
3 FIFTH JUDICIAL CIRCUIT, IN
4 AND FOR SUMTER COUNTY,
5 FLORIDA. 21 DEPOSITION
23 OF
25 AUDREY TANNER
27 DECEMBER 20, 2012
3034 JONALYN BERRY COURT REPORTING
35 P.O. BOX 117
36 SUMTERVILLE, FL 33538
37 (352) 793—3185

2 IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN AND FOR
SUMTER COUNTY, FLORIDA.
14 STATE OF FLORIDA
16 VS.
18 COTTAM
24 DEPOSITION OF: AUDREY TANNER
27 DATE: DECEMBER 20, 2012
30 PLACE: STATE ATTORNEY'S OFFICE
31 BUSHNELL, FLORIDA
34 APPEARANCES: ALLAN KAYE, ESQ.
35 GAINESVILLE, FLORIDA
37 ED MCDONOUGH, ESQ.
38 ASSISTANT STATE ATTORNEY
39 BUSHNELL, FLORIDA

50 COURT REPORTER: CASEY HOGANS

5 DIRECT EXAMINATION BY: MR. KAYE:
9 CERTIFICATE OF OATH:
13 CERTIFICATE:
1 PROCEEDINGS
2 AUDREY TANNER
3 DECEMBER 20, 2012
4 DIRECT EXAMINATION
7 BY MR. KAYE:
10 Q. And Mrs. Tanner, your occupation?
11 A. Communications Supervisor.
10 Let me tell you that when I interviewed officer——when I
11 deposed officer Pelton, he said that he had notified
12 dispatch. And the question that I asked him was that you
13 were in pursuit of a vehicle, and he said that the vehicle
14 was not stopping. As I can understand this, the beginning
15 of this incident, the first time that you had record of
16 this incident was at some time of 4:24?
17 A. Yes.
18 Q. Okay. What is the first call, or the first, uhm,
19 acknowledgement indicate?
20 A. 1020 is location.
21 Q. Okay. So, the first time the officer would have 22 called you was to tell you of his location?
23 A. This is the original call here.
24 Q. Okay.

25 A. Signal 60.
1 Q. Okay. What is that?
2 A. It's a traffic stop.
7 Q. Okay. And what time did that call come in?
8 A. 4:22pm.
9 Q. Okay. And the next call is that he's at a 10 particular location? 1020 on the West side of the track?
11 A. Yes.
12 Q. Okay. And so that would have been how long of a 13 period of time?
14 A. Two minutes.
7 Q. Okay. So, she got the call at 4:22?
8 A. Correct.
9 Q. Okay. And the next call that she gets could have
10 been earlier than 4:24——
11 A. —no. This is the initial call.
12 Q. Okay?
13 A. The traffic stop. Received at 4:22.
20 Q. Okay. So, again, are you saying that it could
21 have come in earlier, or later?
22 A. It could have been later. This is when the
23 initial call. Once you click your stop it automatically
24 stamps your time——
25 Q. —right?
1 A. Once he calls out the additional information, now
2 she types in the information and then she saves it.
3 That's when it time stamps it.

4 Q. Okay. So, the information could have come in
5 earlier, not later, if I understand what you're saying?
6 A. It's only going to be maybe seconds earlier.
14 So, we can assume that was approximately the right time?
15 A. Correct.
16 Q. Okay. And so the call comes in that he's
17 stopping a car, and then he's on West side of the tracks.
1 Q. Okay. And that's after the stop?
2 A. All that information is given at the time of the
3 stop.
4 Q. Okay.
5 A. And it's going to be up to the dispatcher how she
6 posts it in the CAD.
23 Q. And what is that?
24 A. At sixteen twenty—four hours the officer calls
25 out that he's arresting the driver reference fleeing and 11
1 eluding.
2 Q. Was that the first time anything about fleeing
3 and eluding is recorded is when an officer tells
4 communications that he was arresting——this is the charge he's arresting the driver for, correct?
6 A. Yes.
7 Q. Before that, as I understand it, would it be fair
8 to say that there was nothing here that indicates what the stop was for, whether the officer had a problem stopping
10 the vehicle?

11 A. No, there is nothing listed there.
12 Q. There is also nothing listed there saying that
13 the officer called for assistance to help him stop the vehicle, is that correct?
15 A. No, it's not listed.
16 Q. Okay. Would it have been listed?
17 A. If there is something going on then other
18 officers hear the transmissions and they respond.
19 Q. Okay. But would it have been listed, is my
20 question? I understand the officers could have overheard
21 the response. But if the officer called in that he's in pursuit of a fleeing vehicle, he would call that in to communications, right?
24 A. Yes.
25 Q. Would there it be listed? 12
1 A. Yes.
2 Q. And is it fair to say that it's not listed on 3 this particular records?
4 A. From this record it shows this is a traffic stop.
9 Q. Okay. But if the officer says that he called 10 communications, you would have a record of that?
11 A. Yes.
12 Q. Okay. I have no further questions.
13 Thereupon, the deposition of AUDREY TANNER was 14 concluded; WHEREUPON, the witness waived reading the
15 deposition, and Notice of Filing the Deposition was
16 waived.

APPENDIX E

PELTON'S CHARGING DOCUMENT

Court Case No. I Agency Case No

Complaint/Arrest Affidavit Continuation 2012-008519

Defendant's Name COTTAM, JOHN, ARTHUR
PROBABLE CAUSE AFFIDAVIT
(specify probable cause for each charge)

Before Me, this undersigned authority personally appeared DOUGLAS M PELTON alleges, on information and belief, that on the 23 day of July, 2012 in Sumter County, Florida the defendant did: did commit the offense of Fleeing or Attempting to Elude a Law Enforcement Officer, pursuant to F. S. 316/1935(2). On 07/2312012, at approximately 1622 hrs., while operating stationary radar on US 301, I observed a vehicle, described as a 2009 Lexus, beige in color, bearing Florida tag AYIA63, traveling southbound on US 301, south of CR232, within the city limits of Wildwood, Florida, at a rate of speed appearing to be greater than the posted 40 MPH speed limit. I estimated the speed of the vehicle to be 70 MPH. Upon this observation, I activated my assigned radar unit, described as a Kustom Eagle, bearing serial number E26834, that is permanently mounted in my assigned patrol vehicle, identified as Unit 44 and bearing Florida City tag 216750. The clear, high pitched doppler tone emitted from the described radar unit and the initial speed estimation

were consistent with the radar digital speed display reading of 67 MPH. Upon these observations, I initiated a traffic stop by activating the permanently mounted red and blue lights and siren in my ASSigned Wildwood Police Department patrol vehicle with prominently marked insignia. The target vehicle continued to accelerate in a southerly direction on US 301. As I was decreasing the distance between the target vehicle and my patrol vehicle, I was able to observe the driver of the target vehicle looking in the rearview mirror of the vehicle. The target vehicle executed an abrupt right turn onto the portion of Oxford Street, to the west of US 301, within the city limits of Wildwood, Florida. At the most western portion of Oxford Street, prominently displayed are a "Do Not Enter" Sign, and a CSX Property NO TRESPASSING" sign. Also in place, are five large concrete barriers that are intended to keep vehicular traffic from attempting to enter the property or cross the railroad tracks. The target vehicle disregarded the posted signs and abruptly drove around the concrete barriers. I was able to position my patrol vehicle directly behind the target vehicle a that time. The driver of the target vehicle then discontinued fleeing and attempting to elude. Upon making contact with the driver, John Arthur Cottam, WIM, DOB 02124159, identified by his Florida Driver License, he stated that he was unfamiliar with the area, missed a turn, was lost, and was just trying to locate 1-75.

I asked Cottam if he knew how to return to the location where he had missed his turn and he stated that he was able to do so.

Affidavit Continuation
2012-008519

Defendant's Name COTTAM, JOHN, ARTHUR

PROBABLE CAUSE AFFIDAVIT
(specify probable cause for each charge)

Before Me, this undersigned authority personally appeared DOUGLAS M PELTON alleges, on information and belief, that on the 23 day of July, 2012 in Sumter County, Florida the defendant did:

I then advised Cottam that due to his driving actions, his obvious unfamiliarity with the area, and that due to his explanation for the direction and location through which he was traveling being unreasonable, I believed that he was fleeing in an attempt to elude a Law Enforcement Officer.
Cottam was placed under arrest at approximately 1624 hrs. Cottam was transported to the Wildwood Police Department where he was photographedand paperwork was completed. Cottam was issued Florida Uniform Traffic Citation 2054-GYR for Unlawful Speed 67140, pursuant to F.S. 316.189(1), and Florida Uniform Traffic Citation 205~GYR for Fleeing or Attempting to Elude a Law Enforcement Officer, pursuant to F.S. 316.1935(2). Cottam was transported and booked into the Sumter County Jail. The above information is based on my observations.

SWORN to and SUBSCRIBED before me this 23rd day of July

Ofc D Pelton P03.
AFFIANT

B-8
Notary Public - Certified Officer
(circle one)

APPENDIX F

EYEWITNESS (SARAH TRACK/AKAY) AFFIDAVIT

AFFIDAVIT OF SARAH AKAY (PREVIOUSLY SARAH TRACK) IN SUPPORT OF PLAINTIFF'S MOTION TO OPPOSE DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT.

I, being duly sworn, affirm the following is true and correct under penalty of perjury.

1. I am a witness in this action and I respectfully submit this affidavit/affirmation in support of Dr. Cottam's opposition to the motion for Summary Judgment filed by Defendant Douglas Pelton.

2. I have personal knowledge of facts which bear on this motion. There are many genuine disputes regarding many material facts in this case that I personally witnessed.

3. On July 23, 2012, I was travelling home on my usual route South on the 301 from the Villages after work after 4 pm.

4. While I was stopped at a light at the intersection of the 301 and CR 462, I witnessed Dr Cottam pass me in the right hand lane at a high rate of speed (at least 55 mph just as an estimate) while I was stopped at the light in the left hand lane.

5. I was surprised to see him since he normally would turn right (heading West) off the 301 before this intersection.

6. As I progressed South toward the intersection of 301 and Clark St., I witnessed a patrol car on the

far left hand side (East side) of the four–lane divided highway at Clark St. turn on its lights.

7. At that point, I was very close to the start of the large bridge that crosses over the railroad tracks. I had just seen Dr. Cottam pass the peak of the bridge and Dr. Cottam was already just out of my sight for what I believe to be about 2 seconds when I passed the police car off to the left as it turned on its lights. There were no other police cars anywhere in the vicinity between myself and Dr. Cottam.

8. There was also another car behind me that was probably 2 or 3 seconds behind me.

9. As I and the other car behind me passed Clark St., I saw the Police car in my mirror cross the road and get into the lane behind and to the right of me.

10. I progressed over the bridge, slowing slightly.

11. I estimated my speed to be approximately 50 mph when the police officer turned on his lights.

12. At almost the exact time at which I was at Lion St. (just past the end of the bridge), the patrol car passed me with lights only on. **I can with 100% truth declare that Officer Pelton did not have his siren on.**

13. At this point Dr. Cottam was out of my sight beyond the next set of lights which was Cleveland Ave. From the survey that Dr. Cottam commissioned, and had shown me, the distance as shown in the survey between Lion St and Cleveland Ave is 1797.1 feet. So Officer Pelton was more than 1800 feet behind Dr. Cottam when Officer Pelton was at Lion St.

14. The next morning when I came to work and Dr Cottam showed up I asked him "Did that police pull you over?" Dr. Cottam was surprised that I knew

because Dr. Cottam had no idea at the time where the officer was parked and clocked him on radar.

15. Dr. Cottam me what had happened. I asked him why he was still on the 301 there and he said he missed his turn.

16. We talked about this case several times monthly ever since it happened.

17. Dr. Cottam took me one day after work a few weeks later, to the scene again and asked me questions about where the policeman was, etc. He had me recreate my speed and location starting at the light where he passed me to the point where the police officer was. Dr. Cottam told me he wanted to see and find out what happened because he couldn't figure out why it took the police officer so long to catch up with him from Clark St. since he never saw any lights until he was already crossing the railroad tracks.

18. Dr. Cottam has spoken to me of this case numerous times and I have seen and been told of statements Officer Pelton made in his charging document and Deposition.

19. I have seen Officer Pelton's deposition that Dr. Cottam showed me where officer Pelton claimed various things that are impossible.

20. **One example is that Officer Pelton said that he was approximately 100 feet behind Dr. Cottam when Officer Pelton was at Cleveland Ave. This is impossible even with a major exaggeration, since Dr. Cottam was so far ahead of me and Officer Pelton was right beside me at Lion St. when Dr. Cottam was already beyond Cleveland Ave. So again, Officer Pelton was more than 1800 feet behind Dr. Cottam when Officer Pelton was at Lion St..**

21. **Officer Pelton also claimed in his deposition that he noted no other traffic on the road when he started out after Dr. Cottam. This is a complete lie**. There was traffic in front of me, and traffic that had also passed through the light before us from the left that was also proceeding South on the 301 that was ahead of the car which was ahead of me at the light at 462. This traffic was heavy enough that officer Pelton couldn't just drive out into the street from across the street.

22. **Another thing Officer Pelton claimed was that he never lost sight of Dr Cottam. This is also simply impossible.** Officer Pelton was behind me at Clark St, and from there, Dr. Cottam was already out of my sight over the middle of the bridge going over the railroad tracks. Mr. Pelton had lost sight of Dr Cottam before he even put his lights on.

23. **Another thing Officer Pelton claimed was that Dr. Cottam was accelerating away from him. This would be impossible to say since Dr. Cottam was so far ahead of Officer Pelton from the beginning that the Officer would have no way of telling whether Dr. Cottam was speeding up or slowing down**. In fact, for the Officer to catch up to Dr Cottam from where Officer Pelton was at Lion St, when Dr. Cottam was already past Cleveland Ave, Dr. Cottam had to be slowing down.

24. **Another thing Officer Pelton claimed was that he saw Dr. Cottam looking in his rear view mirror when he was behind Dr. Cottam by about 100 feet when Officer Pelton was at Cleveland Ave. This is impossible; Dr. Cottam was out of my sight beyond the lights at Cleveland Ave. by the time Officer Pelton passed me when he and I were at Lion St. So**

Officer Pelton could not have been even close to Dr. Cottam when Officer Pelton passed Cleveland Ave. which is another 1800 feet from Lion St. I understand now that Officer Pelton has changed his story to "side" rear view mirror. I can't myself remember being able to see anyone looking in their side rear view mirror.

25. Officer Pelton also stated in his deposition that he never had to pass anybody to catch up with Dr. Cottam. This is also a lie. He had to pass me, the car in front of me that was at the light before Clark St., and at least one car that had already gone through the intersection at 462, and the car behind me.

26. I can't tell you what an effect this has had on Dr. Cottam's life. It is indescribable. He has been affected by it for years now.

Respectfully submitted, /s Sarah Akay
Sarah Akay (Previously Sarah Track)

STATE OF FLORIDA
COUNTY OF Manatee

BEFORE ME, the undersigned authority, personally appeared SARAH AKAY, and is ☐ personally known to me, or who has ☑ produced an official identification , to wit: FLDL. Who, being duly sworn, says he is the plaintiff in the cause at issue and has read the above statement of claim and asserts the same are true and correct to the best of his belief.
SWORN AND SUBSCRIBED BEFORE ME this 3 day of November, 2017.

Signature of notary /s Tracy Ferguson
Tracy Ferguson
Print or stamp name of notary