



## ELEVENTH CIRCUIT DISCUSSES PROBABLE EXCESSIVE FORCE

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On August 9, 2016, the Eleventh Circuit Court of Appeals decided *Carr v. Cadeau*<sup>i</sup>, in which they examined the issues of arguable probable cause to arrest and First Amendment protected speech. The relevant facts of *Carr*, taken directly from the case, are as follows:

Carr and Gibson live in the Castleberry Hill neighborhood of downtown Atlanta. On the evening of October 5, 2013, the street in front of their home was closed to car traffic for a public arts event called the Flux Festival. The City of Atlanta had granted a permit for the event and arranged for off-duty police officers to provide security. Carr and Gibson were returning from the Flux Festival late at night when they heard [the officer] tell them to get off the street. [The officer] did not identify himself as a police officer. At the time [The officer] yelled at them, Carr and Gibson were walking about 20 to 30 feet from the entrance to their home. Carr responded "what, what the fuck." She then pointed at her door and said, "I live here. This is my home." The couple then continued walking toward their home.

When they reached their home, Gibson began to open the garage door by entering a code into a keypad next to the door. As he entered this code, "a bright flashlight was shined into his face." Gibson looked around the street but couldn't see who was holding the light. He then walked through the garage door and hit the button to close the door behind him. Once he entered the garage, he saw that [the officer] was in the garage chasing his wife into their home. [The officer] began "grabbing Plaintiff Carr and twisting her arm violently behind her, shoving her head-first into a parked car in the garage, then dragging her backwards, passing Plaintiff Gibson, out onto the street area." [The officer] then told another police officer to arrest Gibson "while continuing to drag Plaintiff Carr to his police vehicle where she was arrested."

Carr and Gibson were both taken to the Atlanta City Jail and held until the next morning. Both Carr and Gibson were eventually given citations for violations of the City of Atlanta's municipal code. Carr's citation charged her with disorderly conduct while under the

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influence, and Gibson's charged him with disorderly conduct. When the couple appeared in court to answer their citations, the charges were dismissed.<sup>ii</sup>

Carr and Gibson sued the officer for violating their Fourth and First Amendment rights. The officer filed a motion for summary judgment and qualified immunity and the district court denied the motion. The officer then appealed the denial of qualified immunity to the Eleventh Circuit Court of Appeals.

The first issue on appeal was whether the officer violated Carr and Gibson's Fourth Amendment rights when he entered their home and arrested them without probable cause.

The court first noted two legal principles that apply to this issue. The court stated

At the time Carr and Gibson were arrested, "our binding precedent clearly established . . . that an arrest made without arguable probable cause violates the Fourth Amendment's prohibition on unreasonable searches and seizures." Skop v. City of Atlanta, Ga., 485 F.3d 1130, 1143 (11th Cir. 2007). **Arguable probable cause exists "where reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[] could have believed that probable cause existed to arrest."** Lee v. Ferraro, 284 F.3d 1188, 1195 (11th Cir. 2002).<sup>iii</sup> [emphasis added]

Thus, arguable probable is present if another reasonable officer in the same situation would believe probable cause existed to make an arrest. If an officer has arguable probable cause, he is entitled to qualified immunity from suit.

In this case, the officer argued three reasons why he believed arguable probable cause to arrest Carr and Gibson was present. First, he argued that he had arguable probable cause to arrest Carr and Gibson because they refused to get off the street. The court noted that the evidence indicated that Carr and Gibson continued to walk toward their residence and were arrested as they entered their residence. This is in contradiction to the officer's position that they disobeyed his command.

Second, the officer argued that the fact that Carr said "what, what the fuck" and "I live here" when he told them to get off the street provided arguable probable cause to support their arrest. This argument is addressed in the First Amendment component to Carr's suit. The court did note that

**The First Amendment very clearly protects "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest."** City of Houston, Tex. v. Hill, 482 U.S. 451, 462-63, 107 S. Ct. 2502, 2510 (1987); see also id. at 461, 107 S. Ct. at 2509 ("**[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. Speech is often provocative and challenging. But it is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.**") (quotation omitted and alteration adopted).<sup>iv</sup> [emphasis added]

The officer does not argue that he perceived a reasonable belief of clear and present danger based on the speech so that argument also fails.

Last, the officer argued that arguable probable cause arose when Gibson pressed the “close” button on the garage door as he was arresting Carr. However, the court observed that the officer entered the garage and attempted to arrest Carr prior to Gibson pressing the “close” button on the door. Thus, the court stated that the record does not support how attempting to close the garage door provided arguable probable cause for an arrest that was already in progress.

Thus, the Eleventh Circuit held that arguable probable cause did not exist to arrest Carr and Gibson.

The second issue was whether the officer violated the First Amendment by arresting Carr and Gibson in retaliation for what Carr said to him. The court noted that there are two principles that apply. They are as follows:

- **[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. Speech is often provocative and challenging. But it is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.<sup>v</sup> [emphasis added]**
- **When a police officer has probable cause to believe that a person is committing a particular public offense, he is justified in arresting that person, even if the offender may be speaking at the time that he is arrested. Redd v. City of Enterprise, 140 F.3d 1378 (11th Cir. 1998)<sup>vi</sup> [emphasis added]**

Thus, if a person is uttering words that present a threat or a danger, they may be arrested if they are committing an offense, and this would not violate the First Amendment. However, the court noted that here, the officer did not present evidence that Carr’s words present a danger or threat beyond annoyance or unrest. Instead, the officer argued that Carr was just “speaking at the time she was arrested.”<sup>vii</sup> In fact, the court noted that this argument is contradictory to his Fourth Amendment defense where he stated that what she said gave him arguable probable cause to arrest her, and here, he is argued that she was not arrested because of what she said.

Therefore, because the law is clearly established that an arrest of a person in retaliation for exercising their First Amendment rights violates the constitution, and because the complaint alleges sufficient facts to demonstrate that the plaintiffs were arrested in retaliation for exercising those rights, the court held that the officer was not entitled to qualified immunity.

As such, the court of appeals affirmed the district court’s denial of qualified immunity in this case.

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<sup>i</sup> No. 16-10735 (11th Cir. Decided August 9, 2016 Unpublished)

<sup>ii</sup> Id. at 2-6

<sup>iii</sup> Id. at 5

<sup>iv</sup> Id. at 7

<sup>v</sup> Id.

<sup>vi</sup> Id. at 9

<sup>vii</sup> Id.