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United States Court of Appeals
Tenth Circuit

October 31, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBIN LYNN BAILEY,

Plaintiff - Appellant,

v.

DANIEL TWOMEY; JEREMY WALKER,

Defendants - Appellees.

No. 19-8004
(D.C. No. 1:18-CV-00039-ABJ)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **LUCERO**, **HOLMES**, and **MORITZ**, Circuit Judges.

Robin Bailey brought suit against law enforcement officers Daniel Twomey and Jeremy Walker (collectively, the defendants) under 42 U.S.C. § 1983, asserting they violated her rights under the Fourth and Fourteenth Amendments to the United States Constitution.[1] The district court dismissed Bailey's complaint, and she now appeals. For the reasons discussed below, we affirm the district court's order.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

[1] Bailey also brought additional claims and named other defendants. But because Bailey does not address these other claims on appeal, we likewise limit our discussion to her Fourth and Fourteenth Amendment claims.

Background[2]

On March 6, 2014, Bailey's then-husband Robert Hamborg was arrested for assaulting Bailey. The next day, Hamborg sought to return to Bailey's residence so he could collect some clothing and personal effects. But by then, he was subject to a restraining order. Thus, he contacted the Cheyenne, Wyoming Police Department and requested "a police 'stand[]by'"—i.e., an officer who would accompany him to the residence and supervise his visit. R. vol. 1, 32. Twomey responded to this request.

When Twomey and Hamborg arrived at Bailey's residence, she let them inside. But because she was afraid of Hamborg, she moved to stand behind Twomey. And when she did so, she "brushed or touched Twomey's back or his belt." *Id.* at 33. In response, Twomey "immediately grabbed [Bailey's] left wrist, pulled her around, and hit her very hard in the chest, knocking her to the floor." *Id.*

In relaying these events to his fellow officer Walker immediately after they occurred, Twomey initially indicated he "was unsure of exactly what [Bailey] had

[2] For purposes of resolving this appeal, we "accept[] as true all well-pleaded factual allegations in" Bailey's complaint and "view[] those allegations in the light most favorable to" her. *Straub v. BNSF Ry. Co.*, 909 F.3d 1280, 1287 (10th Cir. 2018). In doing so, we note that Bailey appended to her complaint what she refers to as a "partially transcribed audio recording" of some of the events precipitating her claims (the Transcript). Aplt. Br. 11. And we may generally "consider not only the complaint itself, but also [such] attached exhibits" when reviewing a district court's order to dismiss. *Straub*, 909 F.3d at 1287. But here, the defendants submitted their own version of the Transcript to the district court. And they maintained that their version was more accurate than Bailey's. Ultimately, it appears the district court declined to consider either version of the Transcript. And because we ultimately conclude—for reasons discussed below, *see infra* nn.3–4—that we need not consider either version to resolve the matters before us in this appeal, we do the same.

done" while she was behind him. *Id.* Twomey also told Walker he did not plan to arrest Bailey because "he didn't think she did anything illegal." *Id.* But after Walker repeatedly urged Twomey to "initiate felony charges" against Bailey in order to "protect[]" Twomey "from a possible excessive[-]force claim," Twomey ultimately acquiesced: he arrested Bailey, transported her to the Laramie County Detention Center, and prepared a probable-cause affidavit in which he claimed—falsely, according to Bailey—that she "intentionally grabbed for his gun." *Id.* at 33–34.

As a result of Twomey's allegations, the Laramie County District Attorney's Office initiated criminal charges against Bailey. Twomey then testified against Bailey at both her preliminary hearing and her subsequent jury trial, again alleging that she "attempted to disarm him." *Id.* at 34. Walker testified at Bailey's trial as well. The jury ultimately acquitted Bailey, but by then, she had already "be[en] incarcerated for several months." *Id.* at 36.

After her acquittal, Bailey brought suit against the defendants under § 1983. First, she alleged they violated her Fourth Amendment rights under three separate theories: (1) excessive force; (2) illegal detention; and (3) malicious prosecution. She also alleged the defendants violated her Fourteenth Amendment right to a fair trial.

The defendants moved to dismiss Bailey's claims, arguing, inter alia, that they were entitled to qualified immunity. The district court agreed in part: it ruled the defendants were entitled to dismissal of all Bailey's Fourth Amendment claims on qualified-immunity grounds. It then concluded that Bailey's Fourteenth Amendment claim failed as a matter of law because Bailey "was never convicted." App. vol. 1,

199; *see also Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999) ("Regardless of any misconduct by government agents before or during trial, a defendant who is acquitted cannot be said to have been deprived of the right to a fair trial."). Thus, the district court dismissed Bailey's complaint. Bailey now appeals the district court's order.

Analysis

I. Bailey's Fourth Amendment Claims

"In resolving a motion to dismiss based on qualified immunity," a district court must determine "(1) 'whether the facts that a plaintiff has alleged make out a violation of a constitutional right,' and (2) 'whether the right at issue was clearly established at the time of defendant's alleged misconduct.'" *Keith v. Koerner*, 707 F.3d 1185, 1188 (10th Cir. 2013) (quoting *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011)). "A plaintiff may satisfy" the clearly-established-law requirement by either "identifying an on-point Supreme Court or published Tenth Circuit decision" that would put all reasonable officials on notice that the conduct at issue violates the Constitution, *Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 2015), or by demonstrating that "the clearly established weight of authority from" this court's sibling circuits shows "the law to be as the plaintiff maintains," *id.* (quoting *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir. 2010)).

Here, the district court dismissed Bailey's Fourth Amendment claims because it concluded she failed to demonstrate the law was clearly established. "We review

this decision de novo, applying the same standards as the district court." *Keith*, 707 F.3d at 1187.

A. Excessive Force

In dismissing Bailey's excessive-force claim, the district court relied on Bailey's failure to cite a case in which either this court or the Supreme Court has found a Fourth Amendment violation based on facts that are "comparable to" those present here. App. vol. 1, 184 (citing *White v. Pauly*, 137 S. Ct. 548, 552 (2017)); *see also Pauly*, 137 S. Ct. at 552 (noting that courts should not define clearly established law "at a high level of generality"; explaining that "clearly established law must be 'particularized' to the facts of the case" (first quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); then quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). More specifically, the district court noted that Bailey failed to cite a case in which this court or the Supreme Court has held that the Fourth Amendment bars an officer from "grabbing [an individual's] wrist and knocking [him or] her down after feeling [the individual] touch [the officer] from behind during the course of overseeing a tense domestic matter." R. vol. 1, 188.

In challenging this aspect of the district court's ruling, Bailey advances two arguments. First, she insists this is the type of "obvious case" in which a plaintiff can demonstrate the law "was clearly established under the *Graham* factors alone." Aplt. Br. 18 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)); *see also Graham v. Connor*, 490 U.S. 386, 396 (1989) (noting that in assessing whether particular use of force violates Fourth Amendment, courts should consider "the severity of the crime

at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight"). Thus, Bailey insists, the district court erred in ruling she could not demonstrate the law was clearly established without first identifying "a fact-specific[,] analogous case." Aplt. Br. 18.

Initially, we note that Bailey forfeited her obvious-case argument by failing to raise it below. Thus, we would typically review that argument only for plain error. But because Bailey does not advance a plain-error argument on appeal, she has waived her obvious-case argument altogether. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) (explaining that "failure to argue for plain error and its application on appeal . . . marks the end of the road for an argument for reversal not first presented to the district court"). Nevertheless, we exercise our discretion to reach this waived argument. *Cf. United States v. Black*, 773 F.3d 1113, 1115 n.2 (10th Cir. 2014) (exercising discretion to consider waived argument "on the merits").

In asserting she could satisfy the clearly-established-law requirement without first identifying "a fact-specific[,] analogous case," Bailey cites *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007), and *Morris v. Noe*, 672 F.3d 1185, 1197 (10th Cir. 2012). Aplt. Br. 18. But *Morris* does not endorse the type of generalized approach to the clearly-established-law inquiry that Bailey asks us to apply here. Instead, as we recently explained, "*Morris* constitutes an unremarkable, case-specific application of our view that '[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required

from prior case law to clearly establish the violation.'" *Quinn*, 780 F.3d at 1014 (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004)); *see also Casey*, 509 F.3d at 1284 (describing this same "sliding[-]scale" approach). In other words, *Morris* and *Casey* demonstrate that under certain circumstances, a plaintiff may be able to show the law is clearly established by identifying a previous case that is somewhat *less* "particularized" to the facts of his or her case. *Pauly*, 137 S. Ct. at 552 (quoting *Creighton*, 483 U.S. at 640). But these cases do not negate the particularity requirement entirely. *Cf. Quinn*, 780 F.3d at 1014 (holding that our opinion in *Morris* did not "relieve [p]laintiffs of their obligation to identify clearly established law by reference to decisions that at least ha[d] a substantial factual correspondence with" case at issue).

Likewise, although the Supreme Court has recognized that *Graham*'s "general rules" could potentially "create clearly established law [in] an 'obvious case,'" we have declined to apply this obvious-case exception in cases involving more egregious uses of force than the one at issue here. *Kisela*, 138 S. Ct. at 1153 (quoting *Pauly*, 137 S. Ct. at 552); *see also, e.g.*, *McCoy v. Meyers*, 887 F.3d 1034, 1048–49 (10th Cir. 2018).

In *McCoy*, the plaintiff "was on the ground, lying face-down with his hands behind his back," when one of the defendants placed him in a carotid restraint. 887 F.3d at 1040; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 97 n.1 (1983) (describing carotid restraint as "police control procedure[]" in which officer uses "lower forearm and bicep muscle" to apply pressure to "carotid arteries located on

the sides of the subject's neck"; noting that carotid restraint "is capable of rendering the subject unconscious by diminishing the flow of oxygenated blood to the brain"). The first defendant then "maintained the carotid restraint for approximately five to ten seconds and increased pressure, even though [the plaintiff] was not resisting, thereby causing [him] to lose consciousness"; meanwhile, the other defendants "hit [the plaintiff] in the head, shoulders, back, and arms," resulting in visible cuts and bruises. *Id.* at 1040–41, 1043.

Despite the plaintiff's prone position in *McCoy*, we held the defendants in that case were entitled to qualified immunity because "preexisting precedent would not have made it clear to every reasonable officer that striking [the plaintiff] and applying a carotid restraint on him violated his Fourth Amendment rights." *Id.* at 1048. More specifically, we reasoned that "[w]hether an individual has been subdued from the perspective of a reasonable officer depends on the officer having 'enough time [ ] to recognize [that the individual no longer poses a threat] and react to the changed circumstances.'" *Id.* (second and third alterations in original) (quoting *Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013)). And we concluded that "a reasonable officer in the [defendants'] position" in *McCoy* "could conclude that [the plaintiff] was not subdued when the allegedly excessive force occurred." *Id.* (citation omitted). Notably, in reaching this conclusion, we cited *Graham*. *Id.* And if *Graham* is not sufficient to establish that any reasonable officer would have enough time to discern that an individual who is "lying face down with his hands behind his back and with several officers pinning him" does not constitute a threat, then *Graham*

is likewise insufficient to establish that any reasonable officer in Twomey's position would have known that Bailey did not pose a threat here. *Id.*

Indeed, Bailey's own complaint belies any suggestion to the contrary: it alleges that after she moved behind Twomey and "brushed or touched [his] back or his belt," Twomey "*immediately*" reacted by grabbing Bailey's wrist, striking her in the chest, and knocking her down. App. vol. 1, 33 (emphasis added).[3] And as the Court noted in *Graham*, it is precisely the need for officers to react quickly to such potential threats that courts must consider in assessing an officer's use of force. 490 U.S. at 396–97 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."). Thus, under these circumstances, we cannot say *Graham*'s general guidance would have put all reasonable officers on notice that reacting as Twomey did here would violate the Fourth Amendment.[4]

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[3] Quoting from the Transcript, Bailey asserts that Twomey admitted he "knocked her ass to the ground." Aplt. Br. 20 (quoting App. vol. 1, 23). But this statement does not materially differ from the complaint's allegation that Twomey "knock[ed] her to the floor." App. vol. 1, 33. Thus, we see no need to consider it. *See supra* n.2. Likewise, although Bailey asserts the Transcript reflects that (1) "Twomey acknowledged he hurt [Bailey] when he . . . knocked her ass to the ground" and (2) Twomey "bragg[ed] about the incident to fellow officers," Bailey fails to explain how these allegations might be relevant to the clearly-established-law inquiry. Aplt. Br. 20 (quoting App. vol. 1, 23). Accordingly, we decline to consider them as well.

[4] In arguing otherwise, Bailey cites the Transcript for the proposition that Twomey later "bragg[ed]" to his "fellow officers" about hurting Bailey. Aplt. Br. 20; *see also supra* n.2. But we fail to see how Twomey's post-arrest conduct might establish a constitutional violation, let alone one that is clearly established. *Cf. Graham*, 490 U.S. at 396 (noting that in evaluating excessive-force claim, we assess

Accordingly, because the district court correctly ruled that Bailey could not satisfy the clearly-established-law requirement unless she cited a case with facts "similar" to those present here, we reject her first challenge to the district court's ruling on her excessive-force claim. App. vol. 1, 188.

And we reject Bailey's second challenge to that ruling as well—i.e., her assertion that she can identify "a fact-specific[,] analogous case."[5] Aplt. Br. 18. In making this second argument, Bailey cites *Morris*, 672 F.3d 1185; *Feemster v. Dehntjer*, 661 F.2d 87 (8th Cir. 1981), and *Hays v. Ellis*, 331 F. Supp. 2d 1303 (D. Colo. 2004). But neither a district-court case nor a lone decision from another circuit court will suffice to show the law is clearly established. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011); *Quinn*, 780 F.3d at 1005. And the facts in *Morris* are not sufficiently analogous to those present here to place the constitutional question in this case "beyond debate." *al-Kidd*, 563 U.S. at 741. In *Morris*, the defendant tackled the arrestee—ostensibly to prevent the arrestee from assaulting another individual—even though the arrestee had "his hands up" and "was backing away from [the other

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"reasonableness *at the moment*") (emphasis added). Likewise, to the extent Bailey suggests Twomey subjectively knew she did not pose a threat when he "knocked her to the floor," this allegation is also irrelevant. Aplt. Br. 20; *see also Graham*, 490 U.S. at 397 (explaining that reasonableness inquiry is purely objective; noting that even assuming officer acted maliciously or sadistically in employing force, officer's "subjective motivations" have "no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment").

[5] Because Bailey failed to identify any purportedly similar cases below and does not advance a plain-error argument on appeal, she has waived this challenge to the district court's ruling. *See Richison*, 634 F.3d at 1131. Nevertheless, we opt to consider it on the merits. *Cf. Black*, 773 F.3d at 1115 n.2.

individual] in [an] apparent attempt to deescalate the encounter." 672 F.3d at 1190, 1195–96. Under these circumstances, we concluded that the arrestee's "right to be free from a forceful takedown was clearly established" because the arrestee "posed no threat" to officer or bystander safety. *Id.* at 1198.

But unlike Bailey, who readily concedes that she "brushed or touched Twomey's back or his belt" while moving to "stand behind" him, we see no indication that the arrestee in *Morris* ever touched the defendant in that case—let alone that he did so while outside the defendant's field of vision. App. vol. 1, 33. Given this critical distinction, *Morris* would not put a reasonable officer in Twomey's position on notice that his conduct in this case violated the Fourth Amendment. Thus, Bailey's second challenge to the district court's ruling on her excessive-force claim also fails.

In sum, this is not the type of "obvious case" in which *Graham*'s "general rules" could potentially "create clearly established law." *Kisela*, 138 S. Ct. at 1153 (quoting *Pauly*, 137 S. Ct. at 552). And Bailey does not identify a case in which this court or the Supreme Court has held that an officer acting under circumstances similar to those present here violated the Fourth Amendment. Nor does she demonstrate that "the clearly established weight of authority from other courts" shows "the law to be as" Bailey "maintains." *Quinn*, 780 F.3d at 1005 (quoting *Weise*, 593 F.3d at 1167). Accordingly, we affirm the district court's order dismissing Bailey's excessive-force claim on qualified immunity grounds.

B. Illegal Detention

The district court ruled the defendants were entitled to qualified immunity on Bailey's illegal-detention claim because it concluded Bailey failed to show the law was clearly established. Bailey argues this was error, insisting that at the time of the alleged constitutional violation, it was clearly established "that officers cannot falsify evidence (i.e., make up facts) to supply probable cause for an arrest." Aplt. Br. 29. Thus, she insists, the district court erred in requiring her "to provide a case where the officers lacked probable cause under similar, fact[-]specific circumstances." *Id.*

But for purposes of determining whether the defendants are entitled to qualified immunity, the question in this case is not whether they violated clearly established law by making up facts to support a finding of actual probable cause. Instead, as Bailey expressly concedes elsewhere in her brief, the question is whether the *actual* facts of the encounter gave rise to *arguable* probable cause. *See Cortez v. McCauley*, 478 F.3d 1108, 1116, 1120 (10th Cir. 2007). Further, the answer to that question turns not on whether the defendants in this case subjectively knew or believed they lacked actual probable cause to arrest Bailey but on whether, as a purely objective matter, "a reasonable officer" in the defendants' position "could have believed that probable cause existed" to support Bailey's arrest. *Culver v. Armstrong*, 832 F.3d 1213, 1218 (10th Cir. 2016) (quoting *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014)).

Accordingly, to the extent Bailey asks us to consider Twomey's subjective belief that Bailey did not "d[o] anything illegal," we decline to do so. App. vol. 1, 33.

Likewise, because Twomey's "underlying intent or motivation" is irrelevant to the Fourth Amendment inquiry, *Graham*, 490 U.S. at 397, we also decline to consider Bailey's allegation that he later "made up the fact that the [Bailey] intentionally grabbed his gun in order to criminalize [her] conduct to protect [Twomey] against a potential excessive[-]force claim," Aplt. Br. 25 n.5; *cf. Graham*, 490 U.S. at 397 (explaining that "officer's evil intentions will not make a Fourth Amendment violation out of" his or her objectively reasonable conduct). Instead, like the district court, we set aside Twomey's allegedly false allegation that Bailey attempted to disarm him and ask whether arguable probable cause nevertheless existed to arrest Bailey for "admittedly touch[ing]" Twomey "from behind during the 'standby.'" App. vol. 1, 191 n.4. For the reasons discussed below, we conclude that it did.

Under Wyoming law, an individual commits the misdemeanor offense of interfering with a peace officer if he or she "knowingly obstructs, impedes or interferes with" an officer who is "engaged in the lawful performance of his [or her] official duties." Wyo. Stat. Ann. § 6-5-204(a). And as the district court noted, this court has previously held that arguable probable cause exists to arrest an individual for violating § 6-5-204(a) where that individual merely *verbally* distracts an officer from an ongoing investigation. *See Culver*, 832 F.3d at 1218–20. Here, on the other hand, Bailey's own complaint makes it clear that she *physically* distracted Twomey from his duties. Specifically, her complaint alleges that (1) Bailey moved behind Twomey and touched his back; (2) at the time, Twomey was supervising an interaction between Bailey and her then-husband, who had recently been arrested for

assaulting Bailey and who was therefore subject to a restraining order; and (3) Twomey reacted to Bailey's conduct by "pull[ing] her around, hit[ing] her very hard in the chest, [and] knocking her to the floor." App. vol. 1, 33. Thus, just as the plaintiff's verbal interjections in *Culver* "diverted [the defendant's] attention away from" the individual he was attempting to question, Bailey's physical actions in this case likewise "diverted" Twomey's "attention away from" the individual he was attempting to supervise. 832 F.3d at 1219. And if the plaintiff's conduct in *Culver* created arguable probable cause to support an arrest under § 6-5-204(a), then it stands to reason that Bailey's conduct here did so as well. *See id.* at 1218–19.

In resisting this conclusion, Bailey insists the district court erred in "fail[ing] to consider the totality of the circumstances." Aplt. Br. 22; *see also Cortez*, 478 F.3d at 1116 (explaining that we look to totality of circumstances in assessing probable cause). Specifically, Bailey alleges the district court erred in failing to take into account the following facts: (1) Bailey informed Twomey that "she was scared," that she "went to stand behind him for safety," and that when she "touched or brushed his back," she did so "inadvertently"; and (2) Twomey "only 'thought" that Bailey "touched him" but was ultimately "unsure" about what she did. Aplt. Br. 24.

As an initial matter, to the extent Bailey means to suggest these facts preclude a finding of arguable probable cause, Bailey waived this argument by failing to advance it below and by failing to argue for plain error on appeal. *See Richison*, 634 F.3d at 1131. Nevertheless, we exercise our discretion to reach this argument and, for two reasons, reject it on the merits.

First, even when viewed in the light most favorable to Bailey, the facts in her complaint do not indicate Twomey was unsure about whether Bailey touched him *at all*. Indeed, the complaint unequivocally alleges that Bailey "brushed or touched Twomey's back or his belt." App. vol. 1, 33. And on appeal, Bailey insists she *expressly informed* Twomey that she did so. Aplt. Br. 24. Thus, to the extent Bailey suggests the district court erred in failing to consider the fact that Twomey did not know if Bailey touched him, we disagree. Instead, it appears the only thing Twomey was "unsure" about was whether Bailey *merely* touched him or whether she "intentionally grabbed for his gun." R. vol. 1, 33–34. And in determining whether the defendants were entitled to qualified immunity on Bailey's illegal-detention claim, the district court correctly assumed she did only the former. *See Straub*, 909 F.3d at 1287 (noting that in resolving motion to dismiss, court must accept plaintiff's allegations as true and view them in light most favorable to plaintiff).

Second, we disagree with Bailey's assertion that under *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252 (10th Cir. 1998), any reasonable officer would have accepted Bailey's proffered "explanation" of what happened and declined to arrest her as a result. Aplt. Br. 24. In *Baptiste*, we indicated only that "an officer may not ignore a videotape" in determining whether to arrest a suspect if that videotape "records the alleged criminal acts" and conclusively shows the suspect committed no crime. 147 F.3d at 1257 n.8. No such videotape exists here. And contrary to Bailey's suggestion, nothing in *Baptiste* indicates that in determining whether to arrest a particular individual, officers must blindly accept the individual's description, interpretation, or

explanation of his or her own behavior. *See id.* at 1257. Accordingly, *Baptiste* does not demonstrate that no "reasonable officer" in the defendants' position "could have believed that probable cause existed to arrest or detain" Bailey for violating § 6-5-204(a). *Cortez*, 478 F.3d at 1120.

In short, because Bailey's act of moving behind Twomey and touching his back or belt unquestionably diverted Twomey's attention from his duties, our holding in *Culver* compels us to conclude that arguable probable cause existed to arrest Bailey for violating § 6-5-204(a). *See* 832 F.3d at 1218–20. And nothing in *Baptiste* calls that conclusion into question. Accordingly, we affirm the district court's ruling granting qualified immunity to the defendants on Bailey's illegal-detention claim.

C. Malicious Prosecution

Next, Bailey asserts the district court erred in ruling the defendants were entitled to qualified immunity on her malicious-prosecution claim, in which she alleged they "conspired to supply false information in the probable[-]cause affidavit used to secure an arrest warrant." Aplt. Br. 30. In support, Bailey alleges it is clearly established that officers violate the Fourth Amendment by including false statements in a probable-cause affidavit and that the district court therefore erred in requiring her "to provide fact-specific precedent before it would consider the law clearly established." Aplt. Br. 32.

But as the district court pointed out below, Bailey cannot overcome the defendants' assertion of qualified immunity merely by showing they conspired to include false statements in the probable-cause affidavit. *See Rehberg v. Paulk*, 566

U.S. 356, 370 n.1 (2012) (noting that Court has "accorded . . . qualified immunity to law enforcement officials who falsify affidavits"). Instead, as the district court noted, including false statements in a probable-cause affidavit only violates the Fourth Amendment if correcting those false statements would "vitiate probable cause." App. vol. 1, 197 (quoting *Handy v. City of Sheridan*, 636 F. App'x 728, 740 (10th Cir. 2016) (unpublished)); *see also Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996) ("Where false statements have been included in an arrest[-]warrant affidavit, the existence of probable cause is determined by setting aside the false information and reviewing the remaining contents of the affidavit.").

Thus, in determining whether the defendants were entitled to qualified immunity on Bailey's malicious-prosecution claim, the district court (1) set aside Twomey's allegedly false statement that "he felt [Bailey] grab his gun"; (2) asked whether Bailey demonstrated it was "clearly established" that the remaining facts in the affidavit were insufficient to create probable cause; and (3) stated that, as it previously concluded in dismissing Bailey's illegal-detention claim, Bailey failed to make this showing. App. vol. 1, 198. In other words, the district court appears to have ruled that the defendants were entitled to qualified immunity on Bailey's malicious-prosecution claim because—even after removing Twomey's allegedly false statement from the affidavit—the affidavit's remaining contents were sufficient to create *arguable* probable cause.

In challenging this ruling on appeal, Bailey argues that removing Twomey's assertion indicating he "felt pressure in the form of a 'pull' on [his] holstered

handgun" and replacing that assertion with language indicating (1) "Bailey was afraid of her husband"; (2) Bailey "went to stand behind [Twomey] after her husband and [Twomey] entered her home"; and (3) Twomey "thought she touched [his] back, but was unsure of exactly what she had done [and] didn't believe she had committed a crime or done anything illegal . . . would most definitely vitiate probable cause." Aplt. Br. 31–32 (quoting App. vol. 1, 27). But she does not expressly challenge the district court's apparent application of the arguable-probable-cause standard, despite some support for a different standard in our case law. *Compare Wilkins v. DeReyes*, 528 F.3d 790, 801–02 (10th Cir. 2008) (applying actual probable cause), *with Stonecipher*, 759 F.3d at 1146–47 (applying arguable probable cause).

Yet to resolve this appeal, we need not determine whether the district court applied an *arguable* or an *actual* probable-cause standard or which is the correct standard; Bailey's arguments fail under either standard. *See Morales v. Herrera*, 778 F. App'x 600, 604 n.1 (10th Cir. 2019) (unpublished) (declining to decide whether arguable-probable-cause standard was "doctrinally improper" because appellant's argument failed under actual-probable-cause standard). First, for the reasons discussed above, we conclude that Bailey's proposed exchange—replacing Twomey's assertion with her own proposed language—would not vitiate *arguable* probable cause. *See Culver*, 832 F.3d at 1218–20; *supra* Section I.B. Second, we conclude that Bailey's proposed exchange would not vitiate even *actual* probable cause. Notably, in addition to Twomey's statement that he felt 'a "pull" on [his] holstered handgun," the probable-cause affidavit also indicated that Bailey was

"standing slightly behind" Twomey and that when Twomey turned around, he saw Bailey's "left hand trapped between [his] handgun and right arm." App. vol. 1, 27. Bailey does not suggest these statements are false. And these statements are sufficient to give rise to actual probable cause to arrest her for committing misdemeanor interference. *See* § 6-5-204(a) (providing that individual commits misdemeanor interference with peace officer if he or she "knowingly obstructs, impedes or interferes with" officer who is "engaged in the lawful performance of his [or her] official duties").

Accordingly, because we conclude that Bailey's argument fails under either arguable or actual probable cause, we affirm the district court's order dismissing her malicious-prosecution claim on qualified-immunity grounds.

II. Bailey's Fourteenth Amendment Claim

As a final matter, Bailey argues the district court erred in dismissing her Fourteenth Amendment claim, in which she asserted that the defendants violated her right to a fair trial. In doing so, she asks us to "reconsider" this court's earlier decision in *Morgan*. Aplt. Br. 34; *see also Morgan*, 166 F.3d at 1310 ("Regardless of any misconduct by government agents before or during trial, a defendant who is acquitted cannot be said to have been deprived of the right to a fair trial."). But in the absence of an intervening Supreme Court decision, one panel of this court cannot overrule another panel. *See United States v. Doe*, 865 F.3d 1295, 1298–99 (10th Cir. 2017). And Bailey identifies no such intervening Supreme Court authority here.

Accordingly, because we remain bound by our decision in *Morgan*, we affirm the district court's order dismissing Bailey's Fourteenth Amendment claim.

Conclusion

Because (1) Bailey fails to show the district court erred in ruling the defendants were entitled to qualified immunity on her Fourth Amendment claims and (2) Bailey's Fourteenth Amendment claim is foreclosed by circuit precedent, we affirm the district court's order dismissing Bailey's complaint.

Entered for the Court

Nancy L. Moritz
Circuit Judge