No. 22-2925

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Sekema Gentles,

Plaintiff-Appellant,

v.

Borough of Pottstown, et al.,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Pennsylvania
Case No. 2:19-CV-00581

OPENING BRIEF FOR PLAINTIFF-APPELLANT SEKEMA GENTLES

Sara Brizio
Elizabeth Brownstein
Shreya Sarin
Student Counsel

Becca Steinberg
D.C. Bar No. 1736190
Brian Wolfman
Regina Wang
GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC
600 New Jersey Ave., NW, Suite 312
Washington, D.C. 20001
(202) 662-9549

Counsel for Plaintiff-Appellant Sekema Gentles

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Introduction

One afternoon in March 2017, Sekema Gentles drove his family to Pottstown, Pennsylvania, to see their new home. He stopped the car briefly in the public alley behind their house to see whether they could build a garage. Unbeknownst to Gentles, an anonymous tipster decided that this was suspicious and reported to the Pottstown police that a Black man was looking in garage windows.

Officer Jeffrey Portock responded. Although no one was in the alley when Portock arrived, he later saw Gentles—a Black man—a mile away from the alley, chatting with a family member. Portock approached, told Gentles he was not free to leave, demanded his identification without explanation, and called for backup. Portock and another officer, Brandon Unruh, then handcuffed, searched, and locked Gentles in the back of a police car for twenty minutes while other officers threatened his fiancée and children. After letting Gentles go, Portock criminally cited Gentles for disorderly conduct by unreasonable noise. A judge later found Gentles not guilty of the charge.

The officers acted unlawfully in two respects. First, the officers violated Gentles's Fourth Amendment rights. Neither the anonymous phone call nor Portock's observations gave Portock reasonable suspicion to seize Gentles. And even assuming that a seizure was permissible, the officers unconstitutionally exceeded the scope of a *Terry* stop by handcuffing, searching, and locking Gentles in a police car without any

legitimate justification for such intrusive measures. Second, Portock subjected Gentles to malicious prosecution under Pennsylvania law by issuing a criminal citation without probable cause and with actual malice. The district court's contrary conclusions—that no reasonable jury could find for Gentles on either ground—should be reversed.

Statement of Jurisdiction

The district court had subject-matter jurisdiction over Gentles's federal claims under 28 U.S.C. § 1331 and over Gentles's supplemental state-law claims under 28 U.S.C. § 1367(a). On June 22, 2020, the district court granted in part and denied in part Defendants' motion to dismiss, disposing of all but three claims. Addendum (Add.) 17. On September 29, 2022, the district court granted summary judgment to Defendants, disposing of all remaining claims of all parties, and entered a final judgment. Add. 32. Gentles timely filed his notice of appeal on October 11, 2022. This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented[1]

1. Whether Gentles's refusal to identify himself occurred after he was seized.[2]
2. Whether Officer Portock had reasonable suspicion to stop Gentles.[3]
3. Whether the officers exceeded the permissible scope of a *Terry* stop.[4]
4. Whether there was probable cause to prosecute Gentles for disorderly conduct by unreasonable noise under 18 Pa. Cons. Stat. § 5503(a)(2).[5]

Statutes Involved

Pertinent statutory provisions appear in the addendum to this brief.

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[1] This Court directed Gentles to address the first, second, and fourth issues presented. *See* Order, Doc. 38 (Dec. 23, 2024). We have removed the case citations from the issues set forth by the Court, but their substance is unchanged. We have changed the order of the issues to conform to the order in which they are addressed in this brief.

The Court also directed Gentles to address one further issue—whether Gentles sufficiently disputed Appellees' assertion that he "rushed" to the car. We view this question as encompassed within the second issue.

[2] Raised: Gentles Opp. to Mot. Summ. J., ECF 56, at 6-8; Ruling: Add. 24-29.

[3] Raised: Gentles Opp. to Mot. Summ. J., ECF 56, at 6-8; Ruling: Add. 24-29.

[4] Raised: Gentles Opp. to Mot. Summ. J., ECF 56, at 7-8; Ruling: Add. 26-27.

[5] Raised: Gentles Opp. to Mot. Summ. J., ECF 56, at 8-9; Ruling: Add. 29-30.

Related Cases and Proceedings

This case has not been before this Court before, and Appellant is not aware of any other cases presenting similar issues currently pending before this Court or any other court, state or federal.

Statement of the Case

I. Factual background

A. The Gentles family drives past their own home.

In early 2017, Sekema Gentles and his fiancée Tiffany Flores bought a home in a residential part of Pottstown, Pennsylvania, where many of Gentles's family members reside. JA 53, 64. As of March 1, 2017, the previous owner had not yet moved out, but Gentles and Flores—ecstatic about their first home—decided to drive past the house. JA 53-54.

Gentles runs a landscaping company, so he owns a truck and twenty-foot trailer. JA 52, 54. He and Flores wanted to see whether they could build a garage behind their house to store that equipment. JA 53-54. Gentles drove Flores and their two young children, aged three and four, up the public alley behind the row of houses where the home is located. JA 53-54. They stopped for a few seconds to look at neighbors' garages to see how they could build their own. JA 53-55. They never got out of the car, not wanting to disturb the old owner, and drove off. JA 55, 62-63.

B. Someone makes an anonymous call to the police.

That afternoon, an anonymous caller reported suspicious activity to the Pottstown Police Department. JA 44. At 5:30 p.m., dispatch informed

Jeffrey Portock—an officer with the Department—of the anonymous report that a Black male was looking into garage windows. JA 44.

While Portock was on his way to investigate, the caller "advised that the subject was now leaving in a white Honda sedan bearing PA registration JDM-1017." JA 44. When Portock arrived at the alley, he could not locate the vehicle. JA 44. He cleared the call around 5:31 p.m. and returned to his routine patrol. JA 42, 44.

C. Police officers detain Gentles.

While driving out of town, Gentles spotted one of his family members, Mario Barber, and stopped to speak with him. JA 54-55. Flores and the children stayed in the car. JA 54-55.

Approximately ten minutes after clearing the call, Portock observed a white Honda parked at the corner of Chestnut and North Evans—about one mile from Gentles's home and the public alley Portock had inspected. JA 44.[6] Portock "noticed a [B]lack male subject standing next to the vehicle" and that the Honda's tag number "was the same one given out earlier during the suspicious activity call." JA 44. Portock parked and got out to talk to Gentles, who was standing next to what Portock called "the suspicious vehicle." JA 44.

[6] The Court may take judicial notice of this distance, which was determined using Apple Maps. *See United States v. Leveto*, 540 F.3d 200, 205 n.2 (3d Cir. 2008).

Meanwhile, as Gentles was speaking with Barber, he noticed Portock's marked police car arrive. JA 54-55. Gentles was on parole at the time and did not want to interact with the police, so he decided to leave. JA 54. He began walking to his car, which was parked a few feet away. JA 54. When Portock greeted him, Gentles waved back. JA 56.

After Gentles entered his car and started the engine, Portock called out that he "needed to speak" to Gentles. JA 44. Gentles responded that he had to leave, and Portock "advised at this point that he was not free to leave." JA 44. Gentles then asked Flores, who was sitting in the passenger seat, to start recording the exchange. JA 44, 60.

Through Gentles's open car window, Portock told Gentles that he was under criminal investigation and demanded that Gentles turn over his identification. JA 44, 55, 57. Confused about why he was being investigated, Gentles refused and asked for an explanation. JA 55. Portock did not give him one. JA 55. Gentles continued asking for an explanation, certain that he could not be under criminal investigation because he had committed no crime. JA 55, 59. Gentles's tone was assertive. JA 59. Portock responded that he was "about to request [his] sergeant to take [Gentles] into custody" and called for backup. JA 88 (1:40-1:43); JA 44, 57. At least four officers responded, including Officer

Brandon Unruh. *See* JA 88 (3:45-3:50, 4:26, 9:10-9:30); JA 57.[7] A few times during the encounter, Gentles cursed, frustrated with the situation. *See* JA 88 (2:08-2:14, 2:22-2:27, 3:14-3:17).

While Portock was interacting with Gentles, another officer approached Flores and questioned her. JA 56. Flores explained that Gentles had been in the car with her all day, JA 56, and that the family had been visiting the house they just bought, JA 57. She added that they had done nothing wrong and that Gentles was the car's owner. JA 57.

As more officers approached, Gentles started to fear for his life and the safety of his children, so he got out of his car. JA 57-59, 65. Moments later, Portock and Unruh handcuffed Gentles and brought him to one of the marked patrol vehicles. JA 57-58. From a few feet away, Gentles yelled out to Flores, asking her to take his wallet, but the officers searched him, emptied his pockets, and took his wallet and identification. JA 45, 58, 60, 68. Gentles, still handcuffed, was then locked in the patrol car with the doors closed and the windows up for about twenty minutes. JA 45, 63.

By the time the officers were handcuffing Gentles, Flores was crying—asking the officers why they were arresting her fiancé—and Gentles's four-year-old son was screaming. JA 58. While Gentles sat handcuffed in

[7] Portock's sworn declaration stated that Unruh was not involved in the incident, JA 40, but, as the district court noted, "the video clearly shows Officer Unruh's presence among multiple other officers," Add. 41.

the patrol car, the officers continued to ask Flores for her identification, telling her that she would go to jail and that her children would be placed with Child and Youth Services if Flores did not comply. JA 61; JA 88 (5:45-5:54).

People who lived nearby and were "sitting on their stoop" approximately ten to twenty feet from Gentles's car began paying attention to the commotion and the swarm of officers. JA 44, 61.

The officers told Barber about the details of the investigation, but they still would not tell Gentles or Flores why they were being questioned. JA 58-59, 61-62. After Barber told Flores what the police were investigating—a report that someone had been driving on Fourth Street looking in garages—Flores walked over to the officers and explained that she and Gentles had been checking on the property they owned. JA 45, 59. Portock then opened the door to the police car and let Gentles out. JA 63. The whole encounter lasted about thirty minutes, and it was light outside the entire time. JA 61, 63; *see* JA 88 (9:45).

D. A judge finds Gentles not guilty of disorderly conduct.

After releasing Gentles, Portock stated that he was going to issue Gentles a criminal citation. It is disputed whether Portock told Gentles that the citation would be for refusing to hand over his identification, JA 68, or for disorderly conduct, JA 45. Gentles later received a citation in the mail for "Disorderly Conduct – Unreasonable Noise." JA 66, 68, 77.

Gentles appeared before a local Magisterial District Judge, who found him not guilty. JA 77.

II. Procedural background

Gentles sued Portock, Unruh, and an unnamed officer in the Eastern District of Pennsylvania. He alleged, as relevant here, that the officers unreasonably seized him in violation of the Fourth Amendment. He also brought a malicious-prosecution claim under Pennsylvania law. After discovery, the district court granted Defendants' motion for summary judgment. Add. 18, 32. The district court held that the seizure was justified based on the anonymous call and Gentles's attempt to leave when Portock arrived. Add. 26-29. Further, the court held that Portock had probable cause to cite Gentles for the Pennsylvania crime of disorderly conduct by unreasonable noise because Gentles was noncompliant and assertive, and used explicit language. Add. 29-30.

Gentles then appealed to this Court. While the appeal was pending, Gentles filed a Rule 60(b) motion in the district court, maintaining that he had recently recovered video evidence of the incident. JA 85. This Court retained jurisdiction but remanded the case to the district court for the limited purpose of reviewing Gentles's video evidence and deciding the 60(b) motion. JA 85. The district court denied Gentles's motion. Add. 42. This Court then appointed undersigned counsel to represent Gentles in this appeal. *See* 3d Cir. Doc. 38 (Dec. 23, 2024).

Summary of Argument

I. Portock initiated the seizure when he told Gentles that he was not free to leave. The statement comprised a show of authority, to which Gentles submitted by staying put.

The seizure violated the Fourth Amendment. Portock lacked reasonable suspicion of criminal activity and instead relied on an anonymous caller's subjective perception that a Black man was acting suspiciously in a public alley. The call offered no objective grounds for suspicion and lacked any indicia of reliability. When Portock later encountered Gentles, Gentles was speaking to a family member on the street. Gentles tried to leave after noticing Portock, but that does not change the analysis: Refusal to speak to police does not alone give rise to reasonable suspicion.

The officers extended the investigation beyond the bounds of a *Terry* stop. They employed intrusive methods of investigation—including handcuffing Gentles and locking him in the back of a patrol car for twenty minutes. The officers have provided no legitimate reason why Gentles needed to be detained for that long. The officers therefore converted the stop into an arrest, as Portock's own incident report acknowledged.

Because the officers violated Gentles's clearly established Fourth Amendment rights, they are not entitled to qualified immunity.

II. Portock acted without probable cause and with actual malice when he issued Gentles a criminal citation for disorderly conduct by

unreasonable noise. Gentles was not unreasonably loud, and he did not cause or risk public disturbance. Instead, Gentles raised his voice in the middle of the day only briefly and after police provocation. Because a material factual dispute exists as to probable cause, Portock cannot now claim official immunity.

Standard of Review

The district court's grant of summary judgment is reviewed de novo, with this Court viewing all facts and drawing all reasonable inferences in favor of the non-moving party, here Gentles. *See Glaesener v. Port Auth.*, 121 F.4th 465, 467 (3d Cir. 2024).

Argument

I. The district court erred in granting Defendants summary judgment on Gentles's unreasonable-seizure claim.

The Fourth Amendment prohibits unreasonable searches and seizures. A seizure generally must be "effectuated with a warrant based on probable cause." *United States v. Brown*, 448 F.3d 239, 244 (3d Cir. 2006) (quoting *United States v. Robertson*, 305 F.3d 164, 167 (3d Cir. 2002)). In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court created a limited exception to the warrant requirement, allowing officers to conduct a brief investigatory stop based on "reasonable, articulable suspicion that criminal activity is afoot." *Brown*, 448 F.3d at 244 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). *Terry* requires more than "inchoate and unparticularized suspicion" or a "hunch." 392 U.S. at 27.

And, even when reasonable suspicion exists, the scope of the stop must itself be justified by the "circumstances which rendered its initiation permissible." *Id.* at 19.

Here, Portock seized Gentles when he stopped Gentles from leaving. Portock did so based on an unreliable, anonymous call that conveyed only subjective suspicion stemming from lawful activity in a public alley. The officers then unconstitutionally escalated the stop when they handcuffed Gentles and locked him in the back of a police car for twenty minutes.

A. Portock seized Gentles when Gentles complied with Portock's order not to leave.

Although the district court never determined when Portock seized Gentles, this determination matters. That's because the "Fourth Amendment becomes relevant" at the moment an officer seizes someone. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). "A seizure occurs when there is … submission to 'a show of authority.'" *United States v. Brown*, 448 F.3d 239, 245 (3d Cir. 2006) (quoting *California v. Hodari D.*, 499 U.S. 621, 626 (1991)). Portock made a show of authority when he told Gentles that he was not free to leave, and Gentles submitted to that show of authority by remaining seated in his car.

1. Portock made a show of authority.

A show of authority conveys to a reasonable person "that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Portock's own incident report states that Portock told Gentles "he was

not free to leave." JA 44. A reasonable person would have believed that he was not free to leave after that.

Further, Portock made the statement after Gentles tried to terminate the encounter. This case parallels *Johnson v. Campbell*, where Johnson attempted to decline an officer's request to roll down his van window. 332 F.3d 199, 203 (3d Cir. 2003). "[W]hen [the officer] persisted rather than accepting Johnson's choice not to acquiesce, the interaction became a stop." *Id.* at 206. The same logic applies here. Portock "called out to" Gentles that he "needed to speak to him." JA 44. Gentles attempted to decline this request, telling Portock that he had to leave and starting his car. JA 44. Portock persisted, "advis[ing] at this point that [Gentles] was not free to leave." JA 44. Portock's persistence and his statement that Gentles was not free to leave comprise "precisely the assertion of authority which … indicate[s] an attempted seizure." *United States v. Smith*, 575 F.3d 308, 314 (3d Cir. 2009).

2. Gentles submitted to Portock's show of authority.

Gentles submitted to Portock's show of authority by staying put in his car. Submission to authority requires "more than 'momentary compliance' … with police orders." *Smith*, 575 F.3d at 316 (quoting *United States v. Waterman*, 569 F.3d 144, 146 n.3 (3d Cir. 2009)). "[W]hen a stationary suspect reacts to a show of authority by not fleeing, making no threatening movement or gesture, and remaining stationary, he has submitted under the Fourth Amendment and a seizure has been

effectuated." *United States v. Lowe*, 791 F.3d 424, 434 (3d Cir. 2015). Because "simply remaining in place can constitute submission," *United States v. Hester*, 910 F.3d 78, 86 (3d Cir. 2018), an individual in a car can "submit by staying inside," *Brendlin v. California*, 551 U.S. 249, 262 (2007). That's exactly what Gentles did.

Gentles's subsequent refusal to provide identification is irrelevant. Gentles refused to provide his identification *after* he was seized by Portock. JA 44, 55. Failing to comply with an order after having already submitted to a show of authority does not affect "'submi[ssion]' for Fourth Amendment purposes." *Lowe*, 791 F.3d at 433.

B. Portock lacked reasonable suspicion of criminal activity when he seized Gentles.

The seizure was unjustified from the start. Reasonable suspicion demands that the detaining officer have a "particularized and objective basis for suspecting" the seized person of "criminal activity." *United States v. Brown*, 448 F.3d 239, 246 (3d Cir. 2006) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). This suspicion must be based on more than a "hunch," and the officer must be able to articulate specific reasons justifying the stop. *Johnson v. Campbell*, 332 F.3d 199, 206 (3d Cir. 2003). Courts consider "the totality of the circumstances" to determine reasonable suspicion, including reliable information from others, the officer's own observations, inferences drawn from the officer's

experience, and the circumstances of the stop. *Brown*, 448 F.3d at 246-47; *United States v. Goodrich*, 450 F.3d 552, 561 (3d Cir. 2006).

Here, Portock seized Gentles based on an anonymous call to the Pottstown Police Department that provided no concrete reason to believe anything criminal was happening. And Portock himself saw nothing suspicious. All told, Portock never had "reasonable, articulable suspicion that criminal activity [was] afoot." *Brown*, 448 F.3d at 244 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)).[8]

1. The anonymous call did not contribute to reasonable suspicion.

Police may rely on anonymous tips only when they include "facts that give rise to particularized suspicion" of criminal activity, *Campbell*, 332 F.3d at 206, and "exhibit[] sufficient indicia of reliability," *Alabama v. White*, 496 U.S. 325, 332 (1990). The Pottstown call fails on both counts.

Facts alleged in the call. The call to the police department conveyed only the caller's subjective perception that a Black man was acting suspiciously. *See* JA 44. Reasonable suspicion requires that "the activity of which the detainee is suspected must actually be *criminal*." *Campbell*, 332 F.3d at 208; *see United States v. Ubiles*, 224 F.3d 213, 217-18 (3d Cir. 2000). Although observations of purely legal activity can give rise to

[8] Notwithstanding the district court's suggestion that Gentles conceded that the officers had reasonable suspicion to justify the *Terry* stop, Add. 27, 30 n.12, Gentles did not waive this argument, as recognized by the district court's own analysis of the issue, Add. 25-28.

reasonable suspicion, "one citizen's subjective feelings are not enough to justify the seizure of another where the objective facts do not point to any articulable basis for suspicion." *Campbell*, 332 F.3d at 210.

This Court's precedent requires more than subjective suspicion. In *Johnson v. Campbell*, the police stopped the plaintiff after a motel night clerk—and former police officer—reported a Black man was acting suspiciously. 332 F.3d at 202. The clerk had recently been robbed by a motel guest, and she was suspicious of Johnson because he did not have an obvious reason to be in the motel lobby at night, seemed agitated, paced around the office, rubbed his head, and gave clipped answers to the clerk's questions. *Id.* at 202, 209. Despite the recent robbery, the officers lacked reasonable suspicion because there were no objective facts that could transform Johnson's innocent (if unusual) acts into suspicion of something criminal. *Id.* at 209-10. Likewise, in *Couden v. Duffy*, police observation of "strange behavior"—a person walking into a garage and looking into the house through a window—did not allow the officers reasonably to infer that the person was a "burglar." 446 F.3d 483, 494 (3d Cir. 2006).

These cases starkly contrast with *Terry v. Ohio*, where observations of legal activity provided an objective chain of inferences that criminal activity was afoot. 392 U.S. 1, 22-23 (1968). There, officers saw two men walk identical paths to look in the same store window twenty-four times, confer after each walk, and meet with a third man. *Id.*

The observations of the Pottstown caller are more like *Campbell* and *Duffy* than *Terry*. The caller observed Gentles in a public alley "looking into garage windows." JA 44. That's not illegal. Neither the caller nor Portock ever explained how these facts give rise to an inference that Gentles was engaged in criminal activity. As in *Campbell*, no one has suggested Gentles was "casing" the area as occurred in *Terry*. 332 F.3d at 210. The circumstances here are considerably less concerning than they were in *Campbell*, where the motel clerk had recently been robbed and Johnson's personal conduct was peculiar. *See id.* at 209. Defendants have not pointed to any objective factors, like a history of break-ins or other crime in the area, that might have enhanced the suspicion. And Gentles's behavior was normal, even mundane.

Reliability of the caller. Even if the anonymous call had offered more than subjective apprehension, the source of the call was unreliable. "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated," *Florida v. J.L.*, 529 U.S. 266, 270 (2000), "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *White*, 496 U.S. at 329. Anonymous tips can supply reasonable suspicion only if they are reliable. *J.L.*, 529 U.S. at 270. The Pottstown call was unreliable because the officers had no knowledge of who made the call or the truthfulness of the caller's claims.

This Court uses five factors to evaluate the reliability of anonymous tips, asking whether (1) the information was provided in a face-to-face interaction, (2) the informant can be held responsible if the allegations are untrue, (3) the information would be available to the ordinary observer, (4) the informant witnessed the alleged criminal activity recently, and (5) the informant accurately predicts future activity. *Brown*, 448 F.3d at 249-50. No single factor is dispositive, and courts look to the totality of the circumstances to determine reliability. *United States v. Johnson*, 592 F.3d 442, 449 (3d Cir. 2010). Here, all five factors cut against a finding of reliability.

The first factor does not support reliability because the call was not made face-to-face, so the officers could not assess the caller's credibility and demeanor during the interaction. *See United States v. Valentine*, 232 F.3d 350, 352, 354 (3d Cir. 2000). As for factor two, the caller could not have been held responsible for an untrue report because the caller did not offer any identifying information about themselves. *See United States v. Torres*, 534 F.3d 207, 212-13 (3d Cir. 2008). Absent identifying information that the police could use later, the caller was free to "lead the police astray without fear of accountability." *Id.* at 213.

And, while 911 calls can be more reliable because 911 systems can identify, trace, and record calls, *Navarette v. California*, 572 U.S. 393, 400-01 (2014), no evidence here indicates the call was made to 911. Defendants stated only that dispatch "received[ed] information" from an

"anonymous caller," JA 44, and no transcript of the call was ever produced.[9]

Nor do the third and fifth factors—whether the tipster provided nonpublic or predictive information—support reliability. A tip with specific nonpublic information that matches a "pattern of criminal activity known to the police, but not to the general public" suggests that the caller is familiar with the reported criminal activity. *United States v. Nelson*, 284 F.3d 472, 483-84 (3d Cir. 2002). Similarly, predictive details that the police later corroborate—like accurately predicting a suspect's future movements or behavior—indicate the caller had access to "reliable information about that individual's illegal activities." *White*, 496 U.S. at 332. But without nonpublic or predictive information, officers cannot assess or corroborate the veracity of the caller's criminal allegations and have no reason to think they are reliable. *See Brown*, 448 F.3d at 249-50; *J.L.*, 529 U.S. at 271-72.

Here, anyone could see the white car driving down the public alley, and the caller said nothing about what Gentles might do in the future. The caller failed to provide the nonpublic or predictive information that would have allowed Portock to assess the caller's reliability. *J.L.*, 529 U.S. at 271-72.

[9] The district court referred to the "911 caller" and "911 Operator," Add. 26 n.5, but that did not purport to be a factual finding, and, as just shown, the record nowhere indicates that the 911 system was used.

Finally, the fourth factor—whether the informant "recently witnessed the alleged criminal activity"—does not support reliability. *Brown*, 448 F.3d at 249-50. Eyewitness accounts of recent activity are more credible because people are less likely to lie about contemporaneous events. *Navarette*, 572 U.S. at 399-400. And though the Pottstown caller appears to have been an eyewitness, a tip must "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *J.L.*, 529 U.S. at 272. Thus, police can rely on an anonymous tip reporting a recent or ongoing crime, *United States v. McCants*, 952 F.3d 416, 422-23 (3d Cir. 2020), but cannot rely on an anonymous tip that accurately describes someone but does not allege witnessing anything criminal, *J.L.*, 529 U.S. at 272. Regardless of this call's recency, it did not describe anything criminal.

2. Portock's observations did not create reasonable suspicion.

Portock attempts to bolster the phone call by pointing to his brief interaction with Gentles before the seizure was initiated. JA 44. Of course, police may rely on their own observations and experience to support reasonable suspicion. *Brown*, 448 F.3d at 246. But, as explained above (at 14-15), officers must suspect the person of "*criminal*" conduct. *Campbell*, 332 F.3d at 208. Portock never observed anything that would give rise to reasonable suspicion that Gentles was committing or about to commit a crime.

To begin, the tipster told dispatch the car was leaving. JA 44. Even so, Portock went to the alley himself and affirmed nothing was amiss. JA 44. He cleared the call and returned to his normal patrol. JA 44. From this, a jury could infer any concern arising from the call had been dispelled.

Then, ten minutes later and a mile away, Portock saw Gentles on a residential street chatting to Barber in broad daylight. JA 44, 61. It should go without saying that meeting with someone on the street is not suspicious. *See Brown v. Texas*, 443 U.S. 47, 48-49, 52 (1979). Yet, Portock stopped to approach Gentles. JA 44, 54-55. And by the time Portock reached the car, Gentles's children should have been visible in the backseat. JA 57. Whatever subjective suspicion remained should have been dispelled when Portock observed Gentles engaged in mundane activities. *See Campbell*, 332 F.3d at 209-10; *Duffy*, 446 F.3d at 495.

What happened next is disputed. Although the officers have argued that Gentles "rushed" to his car, JA 44, Gentles has consistently maintained, including in his affidavit, that he "walked to [his] car with [his] normal gait," JA 84; *see* JA 56. The district court incorrectly inverted the summary-judgment standard and declined to view this factual

dispute in Gentles's favor by ignoring his affidavit on the ground that it was "self-serving." Add. 27-28.[10]

The district court was wrong to discredit Gentles's affidavit. "[A] single, non-conclusory affidavit or witness's testimony, when based on personal knowledge and directed at a material issue, is sufficient to defeat summary judgment." *Lupyan v. Corinthian Colls., Inc.*, 761 F.3d 314, 320 (3d Cir. 2014). "This is true even where, as here, the information is self-serving." *Paladino v. Newsome*, 885 F.3d 203, 209 (3d Cir. 2018); *see Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161 (3d Cir. 2009). This rule makes sense. Affidavits based on personal knowledge are permitted at summary judgment. Fed. R. Civ. P. 56(c)(1)(B)(4). And litigants' strongest factual evidence is often their own testimony. So, taking Gentles's affidavit at face value, as the district court should have, he walked to his car at his "normal gait."

[10] The district court also seemed to disregard Gentles's other evidence because Gentles did not refer to it using pinpoint citations. Add. 27 n.8. To the extent the court did this, it was wrong. This Court "flexibl[y]" applies "procedural rules to pro se litigants" like Gentles. *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244 (3d Cir. 2013). Gentles's evidence was readily accessible to the court, not "buried in a voluminous record." *Beenick v. LeFebvre*, 684 F. App'x 200, 206 (3d Cir. 2017) (citation omitted). Moreover, the district court was wrong to suggest that Gentles was "specifically informed" of any rule demanding pinpoint citations, Add. 27 n.8, because the Pro Se Guidelines sent to Gentles were silent on the subject. JA 11-15.

After seeing Portock, Gentles waved, walked to his car at his normal gait, and started the engine. JA 54, 56, 84. Gentles then told Portock he had to leave. JA 44. "[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Gentles's attempt to leave and initial refusal to speak with Portock did not provide reasonable suspicion because civilians have the right to go where they please and refuse to speak to the police. *See Campbell*, 332 F.3d at 208.

A seizure would not have been justified even assuming, contrary to the summary-judgment standard, that Gentles had "rushed" to his car. "[U]nprovoked flight alone" is not "enough to justify a stop." *United States v. Navedo*, 694 F.3d 463, 472 (3d Cir. 2012) (quoting *United States v. Bonner*, 363 F.3d 213, 217 (3d Cir. 2004)). Instead, officers need additional objective facts, like presence in a high-crime area. *Id.* at 470-72. There are many innocent reasons to flee the police, particularly for members of minority groups who may reasonably believe "that contact with the police can itself be dangerous." *Id.* at 471 (quoting *Wardlow*, 528 U.S. at 132 (Stevens, J., concurring in part)).

The district court also erroneously relied on Gentles's refusal to identify himself to find reasonable suspicion. Add. 27. This finding was incorrect because the reasonable-suspicion analysis must be based on "the facts available to the officer at the moment of the seizure." *Terry*, 392 U.S. at 21-22. As explained above (at 12-14), the stop began when

Portock told Gentles he was "not free to leave" and Gentles complied, before Portock requested Gentles's identification. JA 44, 55.

But even assuming the stop began after Gentles refused to turn over his identification, reasonable suspicion would still be lacking. As explained above, "refusal to cooperate, without more, does not furnish the minimal level of objective justification" required for a seizure. *Bostick*, 501 U.S. at 437. Just like flight from the police alone cannot give rise to reasonable suspicion, neither can Gentles's refusal to turn over his identification.[11]

3. The totality of the circumstances did not give rise to reasonable suspicion.

No fact here is enough to suspect Gentles was about to engage in criminal activity, and considering the facts together doesn't change this analysis. As noted earlier (at 14-15), reasonable suspicion is determined based on the totality of the circumstances, but the "facts known to an officer at the time of a *Terry* stop must bear individual significance if they

[11] Pointing to a statute that allows officers to demand identification for violations of Pennsylvania's wildlife and gaming statute, Defendants asserted below that officers in Pennsylvania have a general right to request identification. Def.'s Mem. of Supp. Summ. J., ECF 52-1, at 7 (citing 34 Pa. Cons. Stat. § 904). But Pennsylvanians are not generally required to respond to a police officer's request for identification. *See*, *e.g.*, *Commonwealth v. Durr*, 32 A.3d 781, 786 (Pa. Super. Ct. 2011) ("Simply because a request for identification is constitutionally permissible under the Fourth Amendment does not mean the person of whom the request is made must respond.").

are to be considered in the aggregate." *United States v. Lewis*, 672 F.3d 232, 240 (3d Cir. 2012).

Looking at the whole picture, Portock seized Gentles for going about his normal business based on nothing more than an unknown caller's subjective perception that a Black man was behaving suspiciously. If similar speculation by current and former police officers cannot provide reasonable suspicion, then neither can the unreliable tip here. *See Brown*, 443 U.S. at 52 (current officer); *Campbell*, 332 F.3d at 209 (former officer). Moreover, Portock did not see a Black man in the alley, as had been reported in the call, and had returned to his routine patrol. JA 44. When Portock did eventually see Gentles a mile from the alley, Portock observed a Black man doing nothing more than speaking to someone on the street and then trying to exercise his right not to interact with the police. JA 44, 56. Gentles was in a residential neighborhood, during the day, and Defendants have offered no evidence Gentles was in a high-crime area with any history of burglaries. *See Campbell*, 332 F.3d at 202 (noting recent robbery); *United States v. Goodrich*, 450 F.3d 552, 561 (3d Cir. 2006) (noting "lateness of the hour," location, and history of crime). Based on these facts, a seizure was impermissible.

C. The officers extended the investigation beyond the bounds of a *Terry* stop.

Alternatively, even if the officers had reasonable suspicion, they exceeded the lawful scope of a *Terry* stop. Defendants bear the burden to

show that the seizure "was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, 460 U.S. 491, 500 (1983). "The initial stop does not justify an arrest, prolonged detention, or a stop that lasts any longer than is reasonably necessary to investigate." *United States v. Bey*, 911 F.3d 139, 146-47 (3d Cir. 2018). Put otherwise, a stop's scope "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

Though no bright-line rule distinguishes a "minimally intrusive" investigative stop from a de facto arrest, courts consider the duration of the intrusion, as well as the purposes of the stop and "the time reasonably needed" to accomplish those purposes. *United States v. Sharpe*, 470 U.S. 675, 685 (1985). Officers must investigate diligently by using the "least intrusive means reasonably available to verify or dispel [their] suspicion," *Royer*, 460 U.S. at 500, and taking "necessary measures" to neutralize danger, *Terry*, 392 U.S. at 24.

The officers' treatment of Gentles was excessive. They handcuffed him and locked him in the back of a patrol car for about twenty minutes. JA 63. These intrusive methods served no clear investigatory or safety function: As far as the record reveals, the officers did nothing to investigate his identity during this time, and they had no articulable grounds to believe that Gentles was dangerous. By exceeding the

permissible scope of a *Terry* stop and converting the encounter into an arrest, the officers violated Gentles's Fourth Amendment right to be free from unreasonable searches and seizures.

Intrusive methods. Officers must employ "the least intrusive means reasonably available to verify or dispel [their] suspicion." *Royer*, 460 U.S. at 500. The question is "whether the police acted unreasonably in failing to recognize or to pursue" alternative means. *Sharpe*, 470 U.S. at 687. Where, as here, the officers had no reasonable suspicion, the "least intrusive means" would have been no means at all.

Assuming Portock had reasonable suspicion of criminal activity, the officers' methods exceeded those necessary to investigate the anonymous call. Moments after Gentles stepped out of the car, Portock and Unruh handcuffed him and brought him to one of the marked patrol cars. JA 57-58. They emptied his pockets and took his wallet, then locked him in the patrol car with the windows up for about twenty minutes. JA 60, 63.

To find out what Gentles had been doing in the alley, the officers could have asked him about it up front. They didn't need to handcuff him and lock him inside a police car. What's more, the officers did not need to determine Flores's identity, let alone threaten to send her to jail and her children to Child and Youth Services if she did not turn over her identification. The officers acted unreasonably toward Gentles and his family, and they should have pursued less egregious methods of investigation.

No strict time limits determine "how long a detention may reasonably last." *Carrasca v. Pomeroy*, 313 F.3d 828, 836 (3d Cir. 2002). A twenty-minute seizure does not always turn into an arrest, but it can become one. *Compare Baker v. Monroe Twp.*, 50 F.3d 1186, 1193 (3d Cir. 1995) (fifteen-minute detention is reasonable), *with Royer*, 460 U.S. at 495, 501 (less than fifteen minutes in interrogation room is de facto arrest). That's because the length of time and level of intrusion must be proportional to the circumstances. *Sharpe*, 470 U.S. at 684-85; *Baker*, 50 F.3d at 1193. Here, they were not: The officers failed to investigate diligently during those twenty minutes and have offered no evidence of any safety concerns, let alone ones that justified the level of intrusion that occurred.

Lack of diligence. To determine whether a seizure is reasonable in scope, courts "examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Sharpe*, 470 U.S. at 686.

The officers took Gentles's wallet and identification before locking him in the patrol car and kept them for the next twenty minutes. JA 60, 63. During that time, they chatted with Barber but refused to tell Flores about the investigation. JA 58-59, 61-62. The officers have never explained what they were doing with Gentles's identification for twenty minutes and why Gentles needed to be detained at all, let alone the entire time. This case is therefore unlike *Baker*, where the police were diligent

when they detained people for fifteen minutes because they had to identify and release not just one person but "a fairly large group of people during a drug raid." 50 F.3d at 1192. Similarly, in *United States v. Foster*, placing a potentially armed suspect in handcuffs and transporting him for identification purposes was justified because it was "the course of action most 'likely to confirm or dispel [the officers'] suspicions quickly.'" 891 F.3d 93, 107 (3d Cir. 2018) (quoting *Sharpe*, 470 U.S. at 686). Placing Gentles in handcuffs and locking him in the car for twenty minutes was not the course of action most likely to dispel any suspicion.

Lack of safety concerns. Officers may take measures that are "necessary" to neutralize a "threat of physical harm." *Terry*, 392 U.S. at 24. But these safety measures, like the "use of … handcuffs," need to be "justified by the circumstances." *Baker*, 50 F.3d at 1193. And an officer may search someone for weapons only when he has a justified belief that the person is armed and dangerous. *See Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

Gentles presented no threat of physical harm. Portock did not have reason to believe that Gentles was armed or dangerous, and Portock has never maintained otherwise. The officers never claimed to see a weapon on or near Gentles. Gentles did not resist, even as they handcuffed him. Even if Gentles's demeanor had been "disruptive," JA 44—a characterization we dispute—no safety concern justified handcuffing

Gentles, emptying his pockets, and locking him in the patrol car for twenty minutes.

Although "there are undoubtedly reasons of safety and security that would justify" locking someone in the back of a patrol car, "[t]here is no indication … that such reasons prompted" the officers' actions here. *Royer*, 460 U.S. at 504-05. In *United States v. Carter*, it "was reasonable to handcuff" a person because he was suspected of two recent armed robberies. 2024 WL 195475, at *3 (3d Cir. Jan. 18, 2024). And the "high-crime area" rendered it reasonable "to place Carter in the car" while the officers ran a computerized data search. *Id.* By contrast, Portock and Unruh lacked any suspicion that Gentles had recently committed a crime—let alone multiple violent felonies—and no evidence indicates that the encounter occurred in a high-crime area.

If there were any doubt that Gentles was arrested, Portock himself represented as much. Portock's incident report states that Gentles was arrested for disorderly conduct. JA 42, 45. It is disingenuous for the officers to argue now that Gentles was not arrested when Portock himself represented at the time that he was.

Lack of probable cause. Because the officers exceeded the scope of a *Terry* stop, the seizure became an arrest, for which the officers needed probable cause. As shown above (at 14-25), the officers lacked reasonable suspicion of criminal activity to begin the seizure. Because reasonable suspicion is "less rigorous than probable cause," *Dunaway v. New York*,

442 U.S. 200, 210 (1979), it necessarily follows that the officers lacked probable cause. And over thirty minutes, the officers did not gain new information that would have furnished them with probable cause to justify an arrest.

D. Defendants are not entitled to qualified immunity.

Officers are not entitled to qualified immunity if they violated a constitutional right that was clearly established at the time of their conduct. *See Peroza-Benitez v. Smith*, 994 F.3d 157, 165 (3d Cir. 2021). The burden is on the officers to establish this entitlement. *Id.* And, though qualified immunity allows officers to "execute their duties without the constant threat of litigation, it is 'no license to lawless conduct.'" *Id.* at 164 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)).

To determine whether a right is clearly established, it must be examined at the proper level of specificity given the context of the case. *Peroza-Benitez*, 994 F.3d at 165. Once the right is defined at that level, the question is whether that right was "sufficiently clear that a reasonable officer would understand" that his conduct was unlawful. *Id.* The plaintiff "need not show that there is a prior decision that is factually identical" to his to overcome qualified immunity. *Couden v. Duffy*, 446 F.3d 483, 495 (3d Cir. 2006) (quoting *Doe v. Groody*, 361 F.3d 232, 243 (3d Cir. 2004)).

Viewing the facts in the light most favorable to Gentles, a reasonable officer would have understood that he could not have seized Gentles under these circumstances. A reasonable officer would have known that the vague, subjective suspicion based on observations of Gentles's innocent acts cannot give rise to reasonable suspicion. *See Johnson v. Campbell*, 332 F.3d 199, 209 (3d Cir. 2003); *Duffy*, 446 F.3d at 494-96. A reasonable officer would likewise have known that the anonymous tip without any insider information or concrete allegations of criminal activity was unreliable. *See Florida v. J.L.*, 529 U.S. 266, 271 (2000). And a reasonable officer would have understood that he had no good reason to seize a person who was chatting on the sidewalk, in broad daylight, with small children in the backseat of the car, regardless of whether the person was cooperative with the police. *See Brown v. Texas*, 443 U.S. 47, 48, 52 (1979) (two men meeting in alley was not suspicious); *Duffy*, 446 F.3d at 495 (children visible in car reduced suspicion); *Campbell*, 332 F.3d at 208 (refusal to cooperate is not suspicious).

A reasonable officer also would have known he exceeded the lawful scope of a *Terry* stop during Gentles's seizure. The officer would have understood that he must diligently investigate using the "least intrusive means reasonably available to verify or dispel" suspicion, *Florida v. Royer*, 460 U.S. 491, 500 (1983), while taking only "necessary measures" to neutralize harm, *Terry v. Ohio*, 392 U.S. 1, 24 (1968). A reasonable officer therefore would not have cuffed, searched, and locked Gentles—

who posed no safety threat—in a police car for twenty minutes after obtaining his identification. The officers are not entitled to qualified immunity.

II. The district court erred in granting Portock summary judgment on Gentles's state-law malicious-prosecution claim.

After the unlawful seizure, Portock issued Gentles a criminal citation for the Pennsylvania offense of disorderly conduct by unreasonable noise, 18 Pa. Cons. Stat. § 5503(a)(2). *See* JA 38, 45. Issuing that baseless citation constituted malicious prosecution. A plaintiff alleging malicious prosecution under Pennsylvania law must show (1) that the defendant initiated the criminal proceeding, (2) without probable cause, (3) and with actual malice or for a purpose other than bringing the plaintiff to justice, and (4) that the proceedings terminated in the plaintiff's favor. *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 791 (3d Cir. 2000).

The first and fourth elements are undisputed. Add. 29-30; JA 38. Portock initiated the disorderly conduct proceeding against Gentles, JA 45, and the proceeding terminated in Gentles's favor when a judge found him not guilty. JA 77-78. The parties dispute only the second and third elements. And because a reasonable jury could find that Portock initiated the criminal proceedings without probable cause and with actual malice, summary judgment was improper.

A. The disorderly conduct citation was not supported by probable cause.

Probable cause requires "proof of facts and circumstances that would convince a reasonable, honest individual that the suspected person is guilty of a criminal offense." *Lippay v. Christos*, 996 F.2d 1490, 1502 (3d Cir. 1993) (applying Pennsylvania law). Viewing the facts in the light most favorable to Gentles, a reasonable person would not believe that Gentles violated Pennsylvania's disorderly conduct statute. *See* 18 Pa. Cons. Stat. § 5503(a)(2).

In concluding otherwise, the district court committed three errors. First, the district court relied on its finding that Portock had reasonable suspicion of criminal activity to conclude that he also had probable cause that Gentles violated Section 5503(a)(2). Add. 30. But whether there was a lawful seizure and whether Portock had probable cause are two separate questions. Reasonable suspicion of criminal activity in general does not create probable cause that Gentles violated the specific elements of *this* statute.

Second, the district court was wrong to consider any conduct that resulted from the unlawful seizure. Where, as here, "officers had no authority to compel [a person] to answer their inquiries," that person cannot be convicted "for disorderly conduct[] which was the result of his refusal to answer." *Commonwealth v. Beattie*, 601 A.2d 297, 301 (Pa. Super. Ct. 1991). As shown (at 14-25), Portock's seizure of Gentles was

unlawful, so Gentles's subsequent refusal to cooperate cannot be the basis for the disorderly conduct citation. *See id.*

Third, even assuming the court could rely on the subsequent conduct, Gentles did not violate the statute. To issue a citation for disorderly conduct by unreasonable noise, Portock needed probable cause that Gentles actually made unreasonable noise. The district court found probable cause by pointing to three discrete acts by Gentles—refusing to identify himself, speaking in an assertive tone, and cursing. Add. 30. But, as we now show, the statute does not prohibit any of these behaviors.

A person is guilty of disorderly conduct by unreasonable noise if, "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he … makes unreasonable noise." 18 Pa. Cons. Stat. § 5503(a)(2). "[W]hether … words or acts rise to the level of disorderly conduct hinges upon whether they cause or unjustifiably risk a public disturbance." *Commonwealth v. Hock*, 728 A.2d 943, 946 (Pa. 1999). The disorderly conduct statute "is intended to preserve the public peace" but "is not … a catchall for every act which annoys or disturbs." *Commonwealth v. Maerz*, 879 A.2d 1267, 1269 (Pa. Super. Ct. 2005) (quoting *Hock*, 728 A.2d at 947).

Section 5503(a)(2) has an act requirement and an intent requirement, both of which must be satisfied. *Maerz*, 879 A.2d at 1269. The act requirement evaluates whether the volume of speech constitutes "unreasonable noise," and the intent requirement asks whether the

speaker intended to cause "public inconvenience, annoyance or alarm." *Id.* at 1269-70. Portock lacked probable cause to believe Gentles satisfied either requirement.

1. Gentles did not make unreasonable noise.

Under the statute's act requirement, noise is unreasonable when it is inconsistent with the neighborhood's tolerance or standards. *Commonwealth v. Gilbert*, 674 A.2d 284, 287 (Pa. Super. Ct. 1996). This inquiry is determined "solely by the *volume of the speech*, not by its content." *Maerz*, 879 A.2d at 1269. Courts err when they consider "language content" or find that a person "was too loud in part because [he] was uttering profanities." *Id.* at 1271. Here, Defendants have not established that Gentles's volume was out of step with the neighborhood's tolerance or standards. As shown below, Gentles raised his voice in the middle of the day only briefly.

Volume. The volume of Gentles's speech is disputed. Speech that can be heard from a distance is more likely to constitute unreasonable noise. For example, a jury could find that music heard from fifty yards away was unreasonably loud. *Commonwealth v. Alpha Epsilon Pi*, 540 A.2d 580, 583-84 (Pa. Super. Ct. 1988). And screaming and loud banging from inside a house was unreasonably loud when a neighbor and police officers outside the house could hear it. *McNeil v. City of Easton*, 694 F. Supp. 2d 375, 391 (E.D. Pa. 2010). By contrast, even a loud outburst heard from fifty feet away was not unreasonably loud. *Maerz*, 879 A.2d at 1270-71.

Defendants have not offered any evidence that Gentles could be heard from a distance. Defendants emphasize that children sitting approximately ten to twenty feet away—outside the homes immediately adjacent to Gentles's car—could hear him. JA 36, 44. That does not show that Gentles was unreasonably loud. And Gentles has denied "scream[ing] or rais[ing] his voice to the extent it could be considered a public nuisance or public disturbance." JA 81. Given the factual dispute over Gentles's volume, summary judgment was inappropriate.

Time of day. Gentles's speech occurred while it was still light outside, JA 60-61, and neighbors' tolerance for noise depends on the time of day. Loud outbursts that happen "prior to ordinary sleeping hours" are unlikely to be inconsistent with the neighborhood's tolerance standards. *See Maerz*, 879 A.2d at 1271. By contrast, neighbors may not tolerate loud outbursts late at night when people are sleeping. *See Alpha Epsilon Pi*, 540 A.2d at 583-54 (a jury could find that loud music past 11:00 p.m. on a weeknight was unreasonably loud); *McNeil*, 694 F. Supp. 2d at 391 (loud noise at 3:30 a.m.); *Commonwealth v. Vesel*, 751 A.2d 676, 682 (Pa. Super. Ct. 2000) (loud noise past 2:00 a.m.).

Duration. Gentles's speech was also brief and therefore not unreasonable. The entire encounter between Gentles and Portock lasted about thirty minutes. JA 63. Just minutes after the encounter began, Gentles was locked in the back of the police car, where he remained, with the door shut and the windows rolled up, for about twenty minutes.

JA 63-64. Gentles spoke to Portock in an "assertive" tone for only a few minutes. JA 59; *see* JA 63-64. And although Gentles yelled while the police were handcuffing and locking him in the patrol car, that lasted for less than a minute. JA 88 (4:21-4:56, 5:12-5:28). So, a jury could find that Gentles did not make unreasonable noise. *Compare Commonwealth v. Little*, 297 A.3d 721, 2023 WL 2926406, at *6 (Pa. Super. Ct. Apr. 13, 2023) (table) (five hours was unreasonable), *and Vesel*, 751 A.2d at 678, 682 (around eighteen minutes was unreasonable), *with Maerz*, 879 A.2d at 1272 (brief outburst was not unreasonable).

Neighborhood response. Relatedly, Defendants have offered no evidence that Gentles's speech resulted in noise complaints from neighbors. Unreasonably loud speech disturbs the peace, generally prompting noise complaints. *See Alpha Epsilon Pi*, 540 A.2d at 583-84; *McNeil*, 694 F. Supp. 2d at 391. Because the unreasonable-noise inquiry depends on "the neighborhood's tolerance levels or standards," *Maerz*, 879 A.2d at 1271, that no neighbors indicated that they were, in fact, disturbed strongly suggests that they were not.

2. Gentles did not possess the requisite intent.

A person satisfies the statute's intent requirement if he "intentionally or recklessly created a risk or caused a public inconvenience, annoyance or alarm." *Gilbert*, 674 A.2d at 286. Courts evaluate intent based largely on the same factors that they use to evaluate whether a person's conduct constituted unreasonable noise. *See, e.g.*, *Maerz*, 879 A.2d at 1269-70. So,

though a brief outburst made during the day cannot support intent to cause public disturbance, prolonged loud noise made during sleeping hours can. *Id.*; *see Alpha Epsilon Pi*, 540 A.2d at 583-84 (blasting music past 11:00 p.m. on a weeknight); *Vesel*, 751 A.2d at 682 (banging on a door for around eighteen minutes past 2:00 a.m.). Intent can also be inferred when the defendant has been cited repeatedly in the past for similar conduct. *Little*, 2023 WL 2926406, at *5.

Gentles's speech does not reflect an intent to cause or risk "public inconvenience, annoyance or alarm." As already explained (at 37-38), Gentles's speech was brief and occurred during the day. Gentles also had no history of being cited for disorderly conduct. JA 52. These facts negate any inference of intent to cause or risk public disturbance.

And Portock cannot manufacture probable cause for a disorderly conduct citation based on behavior he provoked in the first place. *See Commonwealth v. Thomas*, 260 A.3d 168, 2021 WL 3183662 at *8 (Pa. Super. Ct. July 28, 2021) (table); *Commonwealth v. Weiss*, 490 A.2d 853, 856-57 (Pa. Super. Ct. 1985). The only reason Gentles spoke to Portock in an "assertive" tone and briefly yelled was because Portock provoked him. *See Weiss*, 490 A.2d at 856-57. Gentles was not making any noise when Portock first spotted him. JA 55-56. By persistently demanding Gentles's identification without explaining why and then handcuffing him, Portock incited the conduct that he later relied on to cite Gentles for disorderly conduct.

Nor can the content of Gentles's speech satisfy the statute's intent requirement. Gentles did not threaten anyone or act aggressively towards police officers or bystanders. JA 81. Although Gentles cursed, "the disorderly conduct statute may not be used to punish anyone exercising a protected First Amendment right." *Commonwealth v. Mastrangelo*, 414 A.2d 54, 58 (Pa. 1980). Explicit language is protected as long as it does not contain threats or "incite violence." *Johnson v. Campbell*, 332 F.3d 199, 213 (3d Cir. 2003); *see Maerz*, 879 A.2d at 1269-70. Expletives serve an important "emotive function," and "one should not be forced to express one's anger or disapproval in measured terms." *Campbell*, 332 F.3d at 212-13.

B. Portock acted with actual malice.

A jury could also find that Portock acted with actual malice, which "may be inferred from the absence of probable cause." *Lippay v. Christos*, 996 F.2d 1490, 1502 (3d Cir. 1993). So, summary judgment as to actual malice was inappropriate because probable cause remains materially disputed. *See supra* at 34-40.

C. Portock is not entitled to official immunity.

Portock is not entitled to official immunity under Pennsylvania law. Local agency employees, such as police, have immunity under limited circumstances. 42 Pa. Cons. Stat. § 8546(2). But employees cannot claim this immunity if they acted with "actual malice." *Id.* §§ 8546(2), 8550;

Cassidy v. Abington Twp., 571 A.2d 543, 545 (Pa. Commw. Ct. 1990). As just shown, actual malice may be inferred from the absence of probable cause. *Eckman v. Lancaster City*, 742 F. Supp. 2d 638, 657 (E.D. Pa. 2010). So, summary judgment is inappropriate when a dispute exists as to probable cause because that dispute also implicates the question of official immunity. *See id.* at 657.

Viewing the facts in the light most favorable to Gentles, Portock acted without probable cause and with actual malice when he issued Gentles a citation under Section 5503(a)(2). He therefore cannot claim official immunity.

Conclusion

This Court should reverse and remand for trial on each of Gentles's claims.

Respectfully submitted,

/s/ Becca Steinberg

Becca Steinberg
D.C. Bar No. 1736190
Brian Wolfman
Regina Wang
GEORGETOWN LAW APPELLATE
COURTS IMMERSION CLINIC
600 New Jersey Ave., NW,
Suite 312
Washington, D.C. 20001
(202) 662-9549

Counsel for Plaintiff-Appellant
Sekema Gentles

Sara Brizio
Elizabeth Brownstein
Shreya Sarin
Student Counsel

February 28, 2025

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/s/ Becca Steinberg
Becca Steinberg

Counsel for Plaintiff-Appellant
Sekema Gentles

Statutory Addendum

18 Pa. Const. Stat. § 5503. Disorderly Conduct.

(a) Offense defined.--A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

> **(1)** engages in fighting or threatening, or in violent or tumultuous behavior;
>
> **(2)** makes unreasonable noise;
>
> **(3)** uses obscene language, or makes an obscene gesture; or
>
> **(4)** creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

(b) Grading.--An offense under this section is a misdemeanor of the third degree if the intent of the actor is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a summary offense.

(c) Definition.--As used in this section the word "public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, any neighborhood, or any premises which are open to the public.

Addendum

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Addendum

Separately Bound Joint Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEKEMA GENTLES, *Plaintiff*,	:	
v.	:	
THE BOROUGH OF POTTSTOWN POLICE OFFICER(S) JEFFREY PORTOCK, *in both personal and official capacities*; UNRUH, *in both personal and official capacities*; and, UNIDENTIFIED OFFICER, *in both personal and official capacities* *Defendants*.	:	CIVIL ACTION NO. 19-0581

MEMORANDUM

Jones, II J. **June 22, 2020**

I. Introduction

The above-captioned matter involves federal claims for unlawful seizure under the Fourth and Fifth Amendments and malicious prosecution, as well as state law claims for malicious prosecution and intentional infliction of emotional distress against Defendants Jeffrey Portock, Brandon Unruh, and an unidentified officer ("Defendants"). Specifically, Plaintiff, proceeding *pro se*, alleges that Defendants violated his civil rights when they arrested, detained, and prosecuted him without probable cause or reasonable suspicion of a crime. Plaintiff was provided with an opportunity to amend his Complaint and the instant Motion to Dismiss followed. For the reasons set forth herein, Defendants' Motion shall be granted in part and denied in part.

II. Background

A. Procedural History

Plaintiff filed his initial Complaint on February 8, 2019 against Officers Pronto and Martin, as well as various other officials of the Borough of Pottstown. (ECF No. 1.) Defendants answered with a Motion to Dismiss on March 12, 2019. (ECF No. 16.) In Plaintiff's Response thereto, he voluntarily withdrew his claims against Officers Pronto and Martin, as well as the Pottstown officials. (ECF No. 17.) On August 28, 2019, this Court granted the remaining Defendants' Motion to Dismiss. (ECF No. 21.) Plaintiff was given an opportunity to amend, and did so. (ECF No. 23.) Once again, the Complaint was met with a Motion to Dismiss by the remaining Defendants. (ECF No. 24.) Plaintiff failed to respond to the motion, therefore this Court issued an Order directing Plaintiff to show cause by a date certain as to why Defendants' Motion should not be granted as unopposed. (ECF No. 25.) Plaintiff failed to do so. Therefore, by Order dated November 13, 2019, this Court granted Defendants' Motion to Dismiss. (ECF No. 26.) Plaintiff then filed his Response (ECF No. 27), as well as a Motion asking this Court to reverse its Order of Dismissal. (ECF No. 28). While this Motion was pending, Plaintiff filed a Notice of Appeal with the Third Circuit Court of Appeals. (ECF No. 29.) This Court granted Plaintiff's Motion seeking reversal on December 17, 2019 (ECF No. 31) and the Third Circuit subsequently dismissed Plaintiff's Appeal on the basis that he failed to pay the filing fee. The matter is now ripe for review.

B. Factual Background[1]

Plaintiff alleges that on March 1, 2017, he was stopped by Defendants, police officers for the Borough of Pottstown. (Am. Compl. ¶ 10.)[2] Defendants asked for Plaintiff's identification and Plaintiff refused to provide it unless they "informed him of the basis for his detention." (Am. Compl. ¶ 10.) Defendants then told Plaintiff he was under criminal investigation, handcuffed and "arrested"[3] him, and placed him in the police vehicle. (Am. Compl. ¶ 11.)

Plaintiff alleges Defendants then asked his fiancée for her identification and threatened to arrest her and place their children in "Child Services" if she did not comply. (Am. Compl. ¶ 12.) Said children were present in the vehicle, screaming. (Am. Compl. ¶¶ 12-13.) Plaintiff's fiancée identified herself and informed Defendants that she and Plaintiff had just purchased a house in Pottstown, and were driving around the area searching for a garage to rent. (Am. Compl. ¶ 13.) After speaking with Plaintiff's fiancée, Defendants then released Plaintiff and issued him a citation for Disorderly Conduct. (Am. Compl. ¶ 14.) Plaintiff was found not guilty of the charge on June 12, 2017. (Am. Compl. ¶ 16.)

As a result of his encounter with Defendants, Plaintiff alleges he suffered "loss of liberty, depression, anxiety, anger, alienation, mental anguish, fear, deprivation, loss of wages, and diminishing mental and physical health." (Am. Compl. ¶ 17.)

[1] The following facts are taken from Plaintiff's Amended Complaint. Because "courts are required to accept all well-pleaded allegations in the complaint as true and to draw all reasonable inferences in favor of the non-moving party[,]" this Court shall proceed accordingly. *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008).

[2] Plaintiff does not specifically allege he was stopped while traveling in a vehicle. However, the same may be inferred by reason of Plaintiff's averment that "[n]o similarly situated White man (in a car with his family including two toddlers) would have been arrested for asking why." (Am. Compl. ¶ 12.)

[3] Although Plaintiff characterizes this brief detention in handcuffs as an "arrest," said statement is a legal conclusion that is not entitled to an inference of truth at the motion to dismiss stage.

III. Standard of Review

When reviewing a Rule 12(b)(6) motion, district courts must first separate legal conclusions from factual allegations. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Legal conclusions should be discarded, and well-pled facts given the deference of truth. *Id*. at 210-211. Courts must then determine whether the well-pled facts state a "plausible claim for relief." *Id*. at 211.

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, [will] not suffice." *Iqbal*, 556 U.S. at 678 (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Fowler*, 578 F.3d at 211 (citing *Phillips*, 515 F.3d at 231). Therefore, when determining the sufficiency of a Complaint, the court must: (1) identify the elements a party must plead to state a claim; (2) determine whether the allegations are no more than conclusions and are thus not entitled to the assumption of truth; and (3) assume the veracity of well-pled factual allegations and determine if they "plausibly give rise to an entitlement for relief." *Santiago v. Warminster Twp.*, 629 F.3d, 121, 130 (3d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 664). At this stage of the litigation, a court must only determine whether the non-movant has sufficiently pled its claims, not whether it can prove them. *Fowler*, 578 F.3d at 213.

Regardless of how "inartfully pled" a *pro se* Complaint is, a court must liberally construe such Complaints and hold them to "less stringent standards than formal pleadings drafted by lawyers." *Fantone v. Latini*, 780 F.3d 184, 193 (3d Cir. 2015) (quoting *Haines v. Kerner*, 404 U.S. 519, 520—521 (1972)). *Pro se* claims may be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *McDowell v. Del. State Police*, 88 F.3d 188, 189 (3d Cir. 1996) (quoting *Haines*, 404 U.S. at 520) (internal quotations omitted)). Despite the court having to liberally construe a *pro se* Complaint, said Complaint must still satisfy the plausibility standard derived from *Twombly* and *Iqbal*. *Alja-Iz v. U.S. V.I. Dept. of Educ.*, 626 F. App'x 44, 46 (3d Cir. 2015) (citing *Fantone*, 780 F.3d at 193)).

III. Discussion

A. Federal Claims

i. Count I: Section 1983 Fourth Amendment Violation

Although somewhat ambiguous as stated, Plaintiff appears to be asserting a claim under 42 U.S.C. § 1983, which "provides private citizens with a means to redress violations of federal law committed by state individuals." *Woodyard v. County of Essex*, 514 F. App'x 177, 180 (3d Cir. 2013) (citing 42 U.S.C. § 1983). Plaintiff alleges that Defendants acted under the color of state law and "sanctioned de facto practices, stopped, detained, seized and arrested Plaintiff without [p]robable [c]ause[,]" in violation of his Fourth Amendment right against unlawful arrest, seizure and detention. (Am. Compl. ¶¶ 2, 20.) In response, Defendants argue in pertinent part that Plaintiff's claim fails because "he has not stated with any specificity who did what and the incident was nothing more than a *Terry* stop." (Defs.' Br. 3.)

Section 1983 provides that "[e]very person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured[.]" 42 U.S.C. § 1983. It "does not create any substantive rights, but provides a remedy for the violation of federal constitutional or statutory rights." *Suber v. Guinta*, 902 F. Supp. 2d 591, 602-603 (E.D. Pa. 2012) (citing *Gruenke v. Seip*, 225 F.3d 290, 298 (3d Cir. 2000)).

In order to prove his claim, a Section 1983 plaintiff must show that: "(1) the conduct complained of was committed by a person or people acting under color of state law; and (2) that the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Schneyder v. Smith*, 653 F.3d 313, 319 (3d Cir. 2011) (citing *Kost v. Kozakiewicz*, 1 F.3d 176, 184 (3d Cir. 1993)). Thus, in order to survive a motion to dismiss, a plaintiff must plead facts which show *both* that the defendants engaged in conduct "made possible only because the wrongdoer is clothed with the authority of state law[,]"*and* that this conduct violated a Constitutional right. *West v. Atkins*, 487 U.S. 42, 49 (1988).

Here, this is no dispute Defendants were operating under the color of state law. Thus, the only issue is whether Plaintiff has pleaded facts to plausibly demonstrate that Defendants' actions constitute a violation of his Fourth Amendment right against unlawful seizure. Therefore, at this stage of the proceedings, Plaintiff's Amended Complaint must contain sufficient facts to show it is *plausible* Defendants lacked reasonable suspicion when they effectuated the stop, and that they seized him. *Iqbal*, 556 U.S. at 678 (citation omitted) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference

that the defendant is liable for the misconduct alleged."). This Court finds Plaintiff has made such a showing.

Aside from alleging there was "no apparent reason" for the stop, this Court construes the basis of Plaintiff's claim to be that Defendants initially refused to tell him why he had been stopped, and then would only say he was "under criminal investigation." (Am. Compl. ¶¶ 10-11.) Plaintiff argues this necessarily means they lacked reasonable suspicion for the stop. (*See generally* Pl.'s Resp. Br. 2-6.) While this is not an accurate statement of the law, given the deference due Plaintiff both as a *pro se* litigant and the non-movant, coupled with Defendants' failure to provide a basis on which this Court could conclude Defendants had a *reasonable* suspicion of criminal activity when they stopped him, this Court must deny Defendants' Motion to Dismiss this claim.

The Fourth Amendment protects citizens from unreasonable searches and seizures. U.S. Const. Amend. IV. "The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures." *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (emphasis in original). For purposes of the Fourth Amendment, a traffic stop is a seizure of the car's occupants. *Delaware v. Prouse*,, 653 (1979). In most cases, "for a seizure to be reasonable under the Fourth Amendment, it must be effectuated with a warrant based on probable cause." *United States v. Robertson*, 305 F.3d 164, 167 (3d Cir. 2002). However, "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). This is a less demanding standard than probable cause. *Id.*

"What is constitutionally 'unreasonable' varies with the circumstances, and requires a balancing of the 'nature and extent of the governmental interests' that justify the seizure against the 'nature and quality of the intrusion on individual rights' that the seizure imposes." *Johnson v. Campbell*, 332 F.3d 199, 205 (3d Cir. 2003) (quoting *Terry*, 392 U.S. at 22, 24). Thus, the test for reasonableness considers the totality of the circumstances, and can include things like the "location, a history of crime in the area, [a driver]'s nervous behavior and evasiveness, and [the officer]'s 'commonsense judgments and inferences about human behavior.'" *Id.* at 205 (quoting *Wardlow*, 528 U.S. at 124-25).

Assuming Defendants herein were conducting a *Terry* stop, Defendants' decision to place Plaintiff in handcuffs does not *necessarily* mean they unlawfully arrested him. *United States v. Johnson*, 592 F.3d 442, 448 (3d Cir. 2010) (citing *Baker v. Monroe Twp.*, 50 F.3d 1186, 1193 (3d Cir. 1993)) (noting that placing someone "in handcuffs while . . . conducting an investigation [does not] automatically transform an otherwise-valid *Terry* stop into a full-blown arrest."). However, the *Terry* stop must have been "justified at its inception"; otherwise, placing an individual in handcuffs *is* an unlawful seizure. *See Terry*, 392 U.S. at 20.

Thus, this Court must determine whether Defendants' actions were justified when they initially approached Plaintiff. In other words, the question is "whether the stop was supported by reasonable suspicion *at the outset*." *Johnson*, 592 F.3d at 452 (emphasis added). Aside from the conclusory statement that Defendants stopped him "for no apparent reason[,]" Plaintiff does allege that Defendants subsequently informed him he was "under criminal investigation." (Am. Compl. ¶¶ 10-11.)[4]

[4] The remainder of Plaintiff's allegations regarding this issue are conclusions based upon what Plaintiff believes were the officers' collective states of mind. *Compare* (Am. Compl. ¶¶ 10, 12, 20) ("[Defendants] stopped . . . Plaintiff for no apparent reason and asked him for his I.D. . . .

Defendants have failed to provide this Court with any meaningful clarification regarding the reason they stopped Plaintiff. Again, based on the facts in the Amended Complaint, Plaintiff was stopped because he was, according to Defendants, "under criminal investigation." (Am. Compl. ¶ 11.) This statement, without more, does not permit the court to conclude that there was a legitimate basis for the stop. The mere fact that Plaintiff was *told* he was under criminal investigation *does not* mean Defendants were justified in stopping him. In order for a *Terry* stop to be justified, officers must have had a suspicion that the individual was about to engage in *criminal* conduct, and be "able to articulate a chain of inferences that led logically to their belief that criminal activity was afoot." *Johnson*, 332 F.3d at 210.

While there is no *requirement* that Defendants articulate such a chain of inferences at this stage of litigation, the effect of their failure to do so is that they cannot sustain a Motion to Dismiss. Because a court must look at the totality of the circumstances in order to determine whether reasonable suspicion of criminal activity existed at the time of the initial stop, and this Court is unable to do so at this stage of the proceedings, it must deny Defendants' Motion as it relates to the Fourth Amendment claim. *See Stiegel v. Peters Twp.*, 2012 U.S. Dist. LEXIS 105661, No. 12-00377, at *12 (W.D. Pa. July 30, 2012) (noting that when a Section 1983 plaintiff pled facts that were nothing more than conclusory statements that the officer lacked reasonable suspicion to stop him, the plaintiff's Fourth Amendment claim could survive a motion to dismiss because "whether [the defendant] had reasonable suspicion to stop [the] [p]laintiff

Plaintiffs' [sic] arrest was done out of spite because he was Black and would not be bullied or intimidated by White men with police badges . . . [Defendants] stopped, detained, seized and arrested Plaintiff without Probable Cause simply because he asked why?") *with* (Defs.'Br. 3-4) ("The few facts alleged, without more, toe the line of a Terry stop. However, Defendants argue that the brief detention coupled with the release do not amount to a 'full-blown arrest' requiring probable cause.").

under the circumstances depends on the resolution of issues of fact."). It is entirely possible that discovery will reveal that, under the totality of the circumstances, Defendants' stop and seizure of Plaintiff was reasonable. Until such time, Plaintiff may maintain his Section 1983 claim.

ii. Malicious Prosecution

In Count II of his Amended Complaint, Plaintiff asserts both federal and state law claims for Malicious Prosecution. His federal claim arises under Section 1983, and Plaintiff appears to allege that Defendants violated his Fifth Amendment right to due process when they arrested him and caused him to be charged and prosecuted for disorderly conduct. In response, Defendants argue that Plaintiff's claim should be analyzed in the context of the Fourth Amendment, under which it fails. (Defs.' Br. 4) ("It is well established that the Fourth Amendment, not the Fifth Amendment is the proper vehicle for addressing any unlawful deprivations of liberty incident to criminal proceedings.") (citing *Albright v. Oliver*, 510 U.S. 266 (1994)).

As a threshold matter, a plaintiff *can* bring a Section 1983 malicious prosecution claim arising under the Fifth Amendment. The Third Circuit has held as such. *Torres v. McLaughlin*, 163 F.3d 169, 173 (3d Cir. 1998) ("[W]e do not read *Albright* to hold that a malicious prosecution claim can only be based in a Fourth Amendment violation. Accordingly, a Section 1983 malicious prosecution claim may also include police conduct that violates the Fourth Amendment, the procedural due process clause or other explicit text of the Constitution."). Nonetheless, Plaintiff's Fifth Amendment claim is not cognizable and must be dismissed, as "the due process clause under the Fifth Amendment only protects against federal governmental action and does not limit the actions of state officials." *Caldwell v. Beard*, 324 F. App'x 186, 189 (3d Cir. 2009).

Because Defendants are not federal actors, Plaintiff cannot maintain a Fifth Amendment claim against them. Plaintiff's claim similarly fails when analyzed under the Fourth Amendment, as Defendants argue is the proper way for this Court to approach the claim. It is well-established that:

> To prove malicious prosecution under section 1983 when the claim is under the Fourth Amendment, a plaintiff must show that: (1) the defendant initiated a criminal proceeding; (2) the criminal proceeding ended in his favor; (3) the defendant initiated the proceeding without probable cause; (4) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.

Johnson v. Knorr, 477 F.3d 75, 81-82 (3d Cir. 2007) (citing *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003)).

In this case, Plaintiff has failed to state a Section 1983 malicious prosecution claim because he has not pled any facts that show he was subject to a seizure. For purposes of establishing the seizure element of a malicious prosecution claim, "'[t]he alleged seizure must occur as a result of the malicious prosecution, and thus, it must occur chronologically after the pressing of charges.'" *Fitzgerald v. Martin*, 2017 U.S. Dist. LEXIS 122228, No. 16-3377, at *25 (E.D. Pa. Aug. 3, 2017) (quoting *Basile v. Township of Smith*, 752 F. Supp. 2d 643, 659 (W.D. Pa. 2010)). A seizure occurs "when a criminal defendant is subject to either pretrial custody or some onerous types of pretrial, non-custodial restrictions such as those on travel out of the jurisdiction." *Id.* (citations omitted). Here, Plaintiff was briefly placed in the back of a police car. He was not arrested and then held in pretrial detention, or otherwise restricted pending the adjudication of his case. Thus, he cannot state a Section 1983 malicious prosecution claim arising under the Fourth Amendment.

B. State Law Claims

i. Malicious Prosecution

As stated above, Plaintiff's Amended Complaint contains both federal and state law claims for Malicious Prosecution. Plaintiff's state law claim alleges that "Defendants detained, arrested and with malice commenced civil and criminal proceedings against Plaintiff without lawful purpose/authority[,]" and because all charges terminated in Plaintiff's favor, Defendants are liable for malicious prosecution. (Am. Compl. ¶¶ 23-25.) In response, Defendants argue that "Plaintiff's claim for malicious prosecution . . . fails as a matter of law, as no facts supporting malice have been pled." (Defs.' Br. 5.)

Plaintiff has stated a plausible state law claim for malicious prosecution. In order to state a claim for malicious prosecution under Pennsylvania law, a plaintiff must show that: "(1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice." *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 791 (3d Cir. 2000).

"Actual malice in the context of malicious prosecution is defined as either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." *Wagner v. Waitlevertch*, 774 A.2d 1247, 1253 (Pa. Super. 2001). "Malice may be inferred from the absence of probable cause . . . [which] is proof of facts and circumstances that would convince a reasonable, honest individual that the suspected person is guilty of a criminal offense." *Lippay v. Christos*, 996 F.2d 1490, 1502 (3d Cir. 1993). As explained above, at this stage of the litigation, Plaintiff has alleged sufficient facts which suggest that Defendants did not have probable cause to stop him, and thus, that the subsequent

prosecution had no basis. In addition, Plaintiff has alleged that Defendants charged him with disorderly conduct to cover up the fact that they had engaged in an unlawful stop. (Am. Compl. ¶ 14.) As such, the malice prong is satisfied because there are facts to suggest both that Defendants lacked probable cause when they stopped Plaintiff, *and* that they charged him with disorderly conduct for "an extraneous improper purpose." *Wagner*, 774 A.2d at 1253.

ii. Intentional Infliction of Emotional Distress

Plaintiff next asserts a state law claim for intentional infliction of emotional distress (IIED). Specifically, Plaintiff alleges that "Defendants, intentionally and with malice inflicted emotional distress upon the Plaintiff arresting and prosecuting him without lawful probable cause." (Am. Compl. ¶ 27.) In response, Defendants argue "Plaintiff fails to allege any facts supporting any extreme or outrageous conduct on the part of the Officers, nor are there any allegations in the Complaint that Plaintiff suffered any form of emotional distress." (Defs.' Br. 7.) This Court agrees, and finds that Plaintiff failed to sufficiently state a claim for IIED.

In order to state an IIED claim, a plaintiff must allege that the defendants: (1) engaged in conduct that was extreme and outrageous, (2) caused the plaintiff severe emotional distress as a result of that conduct, and (3) "acted intending to cause [the plaintiff] such distress or with knowledge that such distress was substantially certain to occur." *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 218 (3d Cir. 2001). "In Pennsylvania, '[l]iability on an intentional infliction of emotional distress claim has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Lawson v. Pa. SPCA*, 124 F. Supp. 3d 394, 409 (E.D. Pa. 2015) (quoting *Kasper v. Cnty. of Bucks*, 514 F. App'x 210, 217 (3d Cir. 2013)).

Plaintiff has not pled *any* facts that would suggest that Defendants' conduct satisfies this standard. While he alleges that he "has suffered loss of liberty, depression, anxiety, anger, alienation, mental anguish, fear, deprivation, loss of wages and diminishing mental and physical health" as a result of Defendants' conduct, he fails to provide this Court with facts that support his conclusory statement of injury, let alone "extreme and outrageous conduct" by Defendants. (Am. Compl. ¶ 17.) Inasmuch as this was Plaintiff's second opportunity to sufficiently plead this claim and he has not done so, this Court finds any further attempt would be futile.[5] Accordingly, Plaintiff's IIED claim shall be dismissed with prejudice. *See Bayer v. Monroe County Children & Youth Servs.*, Civil Action No. 3:04-CV-2505, 2005 U.S. Dist. LEXIS 51697, at *32 (M.D. Pa. Sept. 29, 2005) (concluding "Defendants' alleged conduct could not reasonably be regarded as so extreme and outrageous as to permit recovery" and dismissing IIED claim with prejudice).

C. Pennsylvania Constitution and Fourteenth Amendment

Similar to his original Complaint, Plaintiff once again summarily cites a violation of his rights under Article 1, Sections 1, 8, 9 and 13 of the Constitution of the Commonwealth of Pennsylvania, as well as the Fourteenth Amendment of the United States Constitution. Plaintiff has failed to cure the original deficiencies by articulating any facts or circumstances in relation to

[5] Amendments to a Complaint may be made if the amendment occurs within: "21 days after serving it, or . . . if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1). Plaintiff herein does meet any of the above requirements for amendment, and may therefore only amend his Complaint by leave of court or with the written consent of the opposing party. Fed. R. Civ. P. 15(a)(2). Leave must be freely granted "when justice so requires." *Id.* However, leave may be denied where undue delay, bad faith, dilatory motive, prejudice, or futility are present. *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). In examining futility, the court applies the legal standards of Rule 12(b)(6). *Id.*

these alleged violations. Consequently, all claims brought pursuant to the Pennsylvania Constitution and the Fourteenth Amendment shall be dismissed with prejudice.[6]

D. Declaratory Relief

Plaintiff seeks declaratory relief that Defendants' conduct violated both federal and state law. In response, Defendants argue that "Plaintiff has an adequate remedy at law. Accordingly, Plaintiff's claim for declaratory relief should be dismissed." (Defs.' Br. 8.) This Court agrees. "[E]quitable remedies, including declaratory and injunctive relief, are appropriate only where a plaintiff has no adequate remedy at law." *Cerciello v. Sebelius*, Civil Action No. 13-3249, 2016 U.S. Dist. LEXIS 24924, at *17 (E.D. Pa. Mar. 1, 2016). Here, Plaintiff has a remedy at law, for he can collect damages under Section 1983. *See L.A. v. Lyons*, 461 U.S. 95, 113 (1983) (noting that equitable relief is not available when a plaintiff "has suffered an injury barred by the Federal Constitution, [because] he has a remedy for damages under § 1983."). Thus, this Court shall grant Defendants' Motion to Dismiss Plaintiff's claim for declaratory relief.

E. Punitive Damages

Plaintiff seeks punitive damages against all Defendants. (Am. Compl. *Ad Damnum* Clause, §c.) Defendants seek dismissal of any claims for punitive damages. Punitive damages are available against individual Section 1983 defendants, not working in their official capacities, when their "conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983); *see also Savarese v. Agriss*, 883 F.2d 1194, 1204 (3d Cir. 1989). Plaintiff alleges that Defendants intentionally violated his rights because they stopped him without a legal basis, and they were aware the stop was unjustified. As such, Plaintiff has alleged that

[6] *See* supra n.5.

Defendants were reckless or indifferent. Inasmuch as Plaintiff is suing Defendants in both their official and individual capacities, this Court shall deny this portion of the Motion to Dismiss.

IV. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss shall be denied as to Plaintiff's Fourth Amendment claim, state claim for malicious prosecution, and his claim for punitive damages. Said Motion shall be granted in all other respects.[7] Thus, Plaintiff's federal malicious prosecution claim, IIED claim, Fourteenth Amendment, Pennsylvania Constitution claims, and claims for declaratory relief are dismissed with prejudice.

An appropriate Order follows.

BY THE COURT:

/s/ C. Darnell Jones, II J.
C. DARNELL JONES, II. J.

[7] This Court notes that Defendants herein assert a defense of qualified immunity. However, "attempts to obtain qualified immunity by rebutting or supplementing the allegations in [a] [p]laintiff's Complaint are improper at [the motion to dismiss] stage of the proceedings." *Collick v. William Paterson Univ.*, 699 F. App'x 129, 132 (3d Cir. 2017).

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEKEMA GENTLES, *Plaintiff*,	:	
v.	:	
THE BOROUGH OF POTTSTOWN POLICE OFFICER(S) JEFFREY PORTOCK, *in both personal and official capacities*; UNRUH, *in both personal and official capacities*; and, UNIDENTIFIED OFFICER, *in both personal and official capacities* *Defendants*.	:	CIVIL ACTION NO. 19-0581

ORDER

AND NOW, this 22nd day of June 2020, upon consideration of: Plaintiff's Amended Complaint (ECF No. 23); Defendants' Motion to Dismiss (ECF No. 24); and, Plaintiff's Response (ECF No. 27), it is hereby ORDERED that in accordance with the Court's accompanying Memorandum, said Motion is GRANTED in PART and DENIED in PART as follows:

(1) Defendants' Motion is GRANTED as to Plaintiff's federal claim for Malicious Prosecution, as well as his claims for Intentional Infliction of Emotional Distress, Fourteenth Amendment violations, violations of the Pennsylvania Constitution, and declaratory relief; and,

(2) Defendants' Motion is DENIED as to Plaintiff's Fourth Amendment claim, state claim for Malicious Prosecution, and demand for punitive damages.

It is further ORDERED that Plaintiff's Motion for Relief Pursuant to Rule 60(b) (ECF No. 33) is DENIED as moot.

BY THE COURT:

/s/ C. Darnell Jones, II J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEKEMA GENTLES *Plaintiff,*	:	
v.	:	
JEFFREY PORTOCK, *the Borough of Pottstown Police Officer(s), sued in both personal and official capacities*; UNRUH, *the Borough of Pottstown Police Officer(s), sued in both personal and official capacities*; and, UNIDENTIFIED OFFICER, *the Borough of Pottstown Police Officer(s), sued in both personal and official capacities* *Defendants.*	: : :	CIVIL ACTION NO. 19-0581

MEMORANDUM

Jones, II J. **September 29, 2022**

I. INTRODUCTION

Plaintiff Sekema Gentles commenced the above-captioned action against Defendants, alleging violations of both state and federal law in connection with his allegedly unlawful "arrest" by Officers Portock and Unruh. Currently before the court is Defendants' Motion for Summary Judgment, in which they contend no genuine issues of material facts exist regarding any of Plaintiff's claims, and alternatively, they are entitled to qualified immunity. Plaintiff has responded thereto. For the reasons set forth below, Defendants' Motion shall be granted.

II. BACKGROUND

A. Factual

The undisputed facts borne out by the record, are as follows:

Defendant Portock is a full-time police officer with the Borough of Pottstown Police Department. (SUF ¶ 1.) On March 1, 2017, Defendant Portock was dispatched to the area of 30 West 5th Street in Pottstown, Pennsylvania for a report of suspicious activity. (SUF ¶ 4.) Dispatch informed Defendant Portock that a black male, operating a white Honda sedan bearing a registration of JDM-1017, was looking into garage windows in a suspicious manner. (SUF ¶¶ 5-6.) Acting on information received, Defendant Portock arrived at the area of 30 West 5th Street, Pottstown, Pennsylvania at 17:30 hours. (SUF ¶¶ 7-8.) Unable to locate the vehicle, Defendant Portock cleared the call at 17:31 hours. (SUF ¶ 9.) However, approximately 11 minutes later, during routine patrol, said Officer observed the subject white Honda at the intersection of Chestnut and North Evans Streets. (SUF ¶ 10.) Plaintiff, a Black male, had parked his white Honda at this location and was observed standing next to the vehicle. (SUF ¶¶ 11-12.) The white Honda sedan bore the same registration as the vehicle identified in the dispatch call. (SUF ¶ 13.) Defendant Portock parked his patrol vehicle and advised dispatch of his location. (SUF ¶ 14.) At this time, Plaintiff was standing outside his car, speaking to an individual identified as Mario Barber. (SUF ¶ 15.) Plaintiff observed a police officer pull up in a marked car. (SUF ¶ 16.) Because Plaintiff was on parole, he did not want to be around any "police involvement." (SUF ¶ 18.) Defendant Portock said "hey there" to Plaintiff, at which point Plaintiff waved to the officer. (SUF ¶ 19.) However, when Defendant Portock informed Plaintiff that he needed to speak to him and that he was

under investigation, Plaintiff got into his car and started the ignition. (SUF ¶¶ 19-21.) Defendant Portock asked Plaintiff for identification, however, Plaintiff refused to provide same because he did not believe he was under any obligation to do so. (SUF ¶¶ 22-24.) Defendant Portock again advised Plaintiff he was conducting an investigation and informed Plaintiff that the law required him to provide identification. (SUF ¶ 25.) Plaintiff responded in a "very assertive tone" and began using explicit language as he again refused to provide his identification. (SUF ¶¶ 26-27.) Defendant Portock advised dispatch that the driver was being uncooperative and requested another unit on the scene. (SUF ¶ 28.) While Plaintiff was sitting in his car, Defendant Portock again advised him he was under investigation and requested that he provide his identification. (SUF ¶ 29.) An additional officer arrived on the scene, as children were approximately twenty feet away and neighbors watched the incident. (SUF ¶¶ 30-32.) Plaintiff exited his vehicle and stood by the driver's door, while Defendant Portock was approximately ten to fifteen feet away, speaking with the other officer. (SUF ¶¶ 33-34.) When Defendant Portock returned to Plaintiff, he proceeded to handcuff him and search his person for identification. (SUF ¶¶ 36-37.) At no time did Defendant Portock pull his weapon on Plaintiff. (SUF ¶ 35.) Plaintiff's wallet was removed and Defendant Portock located Plaintiff's identification. (SUF ¶¶ 37, 39.) Once identified, Plaintiff was placed in the back of Defendant Portlock's patrol vehicle. (SUF ¶¶ 39-40.)

As Plaintiff sat in the back of the police vehicle, Defendant Portlock approached a female passenger who had been sitting in Plaintiff's car, in order to identify her and inquire into the basis of the dispatch report. (SUF ¶ 41.) Sergeant Michael Ponto arrived at the scene and positively identified the female passenger as Tiffany Flores. (SUF ¶ 42.)

Both Defendant Portock and Sergeant Ponto explained several times that Gentles was required to identify himself. (SUF ¶ 43.) It was explained to Ms. Flores that the vehicle was stopped due to a report of suspicious activity involving a Black male, operating a white Honda sedan with Plaintiff's registration number, looking into garage windows. (SUF ¶ 44.) Ms. Flores confirmed she and Plaintiff were buying a house in the area and had been looking into garage windows. (SUF ¶ 45.) After obtaining information from Tiffany Flores, Defendant Portock returned to the patrol vehicle to speak to Plaintiff, remove the handcuffs, release him from the patrol vehicle, and inform him he would be receiving a citation for Disorderly Conduct in the mail. (SUF ¶¶ 46-48, 50.)

Plaintiff had been in the police vehicle approximately 20 minutes. (SUF ¶ 49.) Defendant Portock and Sergeant Ponto were the only Pottstown Police Department Officers present at the scene. (SUF ¶ 52.) [1]

On March 15, 2017, a Citation charging Plaintiff with "Disorderly Conduct - Unreasonable Noise" was filed and a Summons was issued the following day. (SUF ¶ 53.) On April 3, 2017, a hearing was held in Magisterial District Judge Edward C. Kropp's office. (SUF ¶ 54.) However, Plaintiff failed to appear for the April 3, 2017 hearing. (SUF ¶ 55.)[2] Plaintiff did appear before the court on June 12, 2017, at which time he received a not guilty verdict on the charge. (SUF ¶ 56.)

[1] Although Plaintiff asserts a claim against Defendant Unruh, said Defendant was not present at the scene. (SUF ¶ 52.)

[2] Defendants cite to the court docket and information provided by Officer Portock in the Incident Report to establish Plaintiff was found guilty *in absentia* on April 3, 2017. However, the docket does not explicitly state so. A summary trial was scheduled to occur on that date and the docket indicates it was continued to June 12, 2017. (ECF No. 53 at 45.) During his deposition, Plaintiff testified "I believe my attorney may have canceled the first date, I believe. And I was told I didn't have to show. The next date I went with my attorney and was fully vindicated of the

B. Procedural

On February 8, 2019, Plaintiff commenced suit against The Borough of Pottstown, Police Chief F. Richard Drumheller, Mayor Sharon Valentine-Thomas, Borough President Daniel Weand, Borough Manager Mark Flanders, Police Sergeant Ponto, Police Officer Jeffrey Portock, Police Officer Martin, Police Officer Unruh, and an Unidentified Police Officer. Defendants filed a Motion to Dismiss, which was granted with leave for Plaintiff to amend a limited number of claims. On September 20, 2019, Plaintiff filed an Amended Complaint against the remaining defendants, asserting violations of his federal and state law rights. A second Motion to Dismiss was filed and this Court ultimately ruled that Plaintiff's claims were to be limited to a Fourth Amendment violation, a state law claim for malicious prosecution, and a request for punitive damages against Officers Portock and Unruh.[3] Upon conclusion of discovery, said Defendants filed the instant Motion for Summary Judgment.

III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(a), a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine [dispute] as to any material fact and that the moving party is entitled to a summary judgment as a matter of law." *Celotex*, 477 U.S. at 322; Fed. R. Civ. P. 56(a). "If the moving party meets its burden, the burden shifts to the nonmoving

frivolous charge after having my day in court." (ECF No. 53 at 34.) For reasons set forth in the court's discussion below, this issue is not dispositive of any claim.

[3] This Court notes that Plaintiff initially failed to respond to Defendants' Second Motion to Dismiss. A Show Cause Order was issued and Plaintiff failed to comply. (ECF No. 25.) Accordingly, the matter was dismissed. (ECF No. 26.) However, Plaintiff later filed a Response, a "Motion to Reopen," and an Appeal to the Third Circuit. (ECF Nos. 27-29.) This Court granted Plaintiff's Motion to Reopen (ECF No. 31) and his appeal was dismissed (ECF No. 32). Defendants' Second Motion to Dismiss was disposed of on June 22, 2020 and formal discovery commenced.

party to go beyond the pleadings and come forward with specific facts showing that there is a genuine issue for trial." *Santini v. Fuentes*, 795 F.3d 410, 416 (3d Cir. 2015) (internal citations and quotation marks omitted). Therefore, in order to defeat a motion for summary judgment, the non-movant must establish that the disputes are both: (1) material, meaning concerning facts that will affect the outcome of the issue under substantive law; and (2) genuine, meaning the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." *Singletary v. Pa. Dep't of Corr.*, 266 F.3d 186, 193 (3d Cir. 2001) (quoting *Celotex*, 477 U.S. at 325). "[A] nonmoving party must adduce more than a mere scintilla of evidence in its favor and cannot simply reassert factually unsupported allegations contained in its pleadings[.]" *Williams v. West Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (citation omitted). Accordingly, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. To that end, "conclusory, self-serving affidavits are insufficient to withstand a motion for summary judgment." *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161 (3d Cir. 2009) (citing *Blair v. Scott Specialty Gases*, 283 F.3d 595, 608 (3d Cir. 2002)) (internal quotation marks omitted). Instead, an affiant must set forth specific facts that reveal a genuine issue of material fact. *Id.*

A court must "view the facts and any reasonable inferences drawn therefrom in the light most favorable to the party opposing summary judgment." *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 160 (3d Cir. 2003). However, if a party fails to properly address another party's assertion of fact, a court may consider the fact undisputed and grant summary judgment. *See* Fed. R. Civ. P. 56(e)(2)-(3); *see also Judge C. Darnell Jones II Chambers Policies and Procedures* (rev'd Feb. 23, 2022), http://www.paed.uscourts.gov/documents/procedures/jonpol.pdf ("The Court will not consider any description of a fact that is not supported by citation to the record. Statements of Material Facts in support of or in opposition to a motion for summary judgment must include specific and not general references to the parts of the record that support each of the statements, such as the title of or numbered reference to a document, the name of a deponent and the page(s) of the deponent's deposition, or the identity of an affidavit or declaration and the specific paragraph relied upon. Pinpoint citations are required.").

IV. DISCUSSION

A. Section 1983 Fourth Amendment Violation

Section 1983 provides that "[e]very person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured[.]" 42 U.S.C. § 1983. Section 1983 "does not create any substantive rights, but provides a remedy for the violation of federal constitutional or statutory rights." *Suber v. Guinta*, 902 F. Supp. 2d 591, 602-603 (E.D. Pa. 2012) (citing *Gruenke v. Seip*, 225 F.3d 290, 298 (3d Cir. 2000)).

In order to prove his or her claim, a Section 1983 plaintiff must show that: "(1) the conduct complained of was committed by a person or people acting under color of state law; and

(2) that the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Schneyder v. Smith*, 653 F.3d 313, 319 (3d Cir. 2011) (citing *Kost v. Kozakiewicz*, 1 F.3d 176, 184 (3d Cir. 1993)). Thus, a plaintiff must ultimately establish that the defendants engaged in conduct "made possible only because the wrongdoer is clothed with the authority of state law[,]"***and*** that this conduct violated a Constitutional right. *West v. Atkins*, 487 U.S. 42, 49 (1988).

Here, this is no dispute that while carrying out his job responsibilities as a police officer with the Borough of Pottstown Police Department on March 1, 2017, Defendant Portock was acting under color of state law. (SUF ¶ 1.)[4] Thus, the only issue is whether Plaintiff has adduced evidence of record to demonstrate that said Defendant's actions constituted a violation of his Fourth Amendment right against unlawful seizure.

The Fourth Amendment protects citizens from unreasonable searches and seizures. U.S. Const. Amend. IV. "The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures." *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (emphasis in original). "[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). This is a less demanding standard than probable cause. *Id.*

"What is constitutionally 'unreasonable' varies with the circumstances, and requires a balancing of the 'nature and extent of the governmental interests' that justify the seizure against the 'nature and quality of the intrusion on individual rights' that the seizure imposes." *Johnson v.*

[4] The undisputed facts establish that Defendant Unruh was not involved in this matter. Accordingly, this Court's discussion shall focus solely on the other named Defendant Officer: Jeffrey Portock.

Campbell, 332 F.3d 199, 205 (3d Cir. 2003) (quoting *Terry*, 392 U.S. at 22, 24). Thus, the test for reasonableness considers the totality of the circumstances, and can include things like the "location, a history of crime in the area, [a driver]'s nervous behavior and evasiveness, and [the officer]'s 'commonsense judgments and inferences about human behavior.'" *Id.* at 205 (quoting *Wardlow*, 528 U.S. at 124-25).

In this case, the undisputed facts demonstrate that Defendant Portock received a radio call describing a Black male, operating a white Honda sedan bearing a registration of JDM-1017, looking into garage windows in a suspicious manner. (SUF ¶¶ 5-6.)[5] While on patrol several minutes later, Officer Portock observed the subject white Honda—including the matching registration number—with a Black male (later identified as Plaintiff) standing next to it. (SUF ¶¶ 10-13.) After multiple unsuccessful attempts to have Plaintiff identify himself, Plaintiff began speaking to Defendant Portock in a "very assertive tone" and used explicit language while again refusing to provide his identification. (SUF ¶¶ 22-27.) Defendant Portock advised dispatch that the driver was being uncooperative and requested another unit on the scene. (SUF ¶ 28.) After the arrival of a second officer, Sergeant Ponto, Defendant Portock proceeded to handcuff Plaintiff and search his person for identification. (SUF ¶¶ 36-37.)

Defendant Portock's decision to place Plaintiff in handcuffs did not *necessarily* mean Plaintiff was being unlawfully arrested. *United States v. Johnson*, 592 F.3d 442, 448 (3d Cir. 2010) (noting that placing someone "in handcuffs while . . . conducting an investigation [does not] automatically transform an otherwise-valid *Terry* stop into a full-blown arrest.") (citing

[5] In his Response to the instant Motion, Plaintiff mischaracterizes the contents of the Incident Report by stating the 911 caller told the 911 Operator there "was a black man in a car, that he did not exit, was looking in garage windows from his car in the back of a house." (Pl.'s Opp'n Summ. J. 4.)

Baker v. Monroe Twp., 50 F.3d 1186, 1193 (3d Cir. 1993)).[6] However, the *Terry* stop must have been "justified at its inception"; otherwise, placing an individual in handcuffs *is* an unlawful seizure. *See Terry*, 392 U.S. at 20. Clearly, the vehicle and plates matching the description, coupled with a Black male standing next to the vehicle, were enough—in and of themselves—to justify the initial stop of Plaintiff. However, Plaintiff's rush to get into his vehicle, start the ignition, and refusal to comply with Defendant Portock's simple request to identify himself provided further justification for the officer to believe Plaintiff had committed an offense. The totality of the circumstances as contained within the record before this Court establishes that Defendant Portock was completely justified in briefly detaining Plaintiff until he could obtain Plaintiff's identification and acquire more information from the passenger of Plaintiff's car.[7] In fact, Plaintiff concedes "Defendant's [sic] were entitled to conduct a limited Terry Stop." (Pl.'s Opp'n Summ. J. 4.) A "limited Terry Stop" is exactly what occurred.

As previously noted, although Plaintiff opposes the instant Motion, he fails to provide this Court with any contrary evidence of record,[8] except his own, self-serving affidavit. It is

[6] Plaintiff, without presenting any evidence of record aside from his own self-serving Affidavit, unilaterally concludes his detainment amounted to an arrest. (Pl.'s Opp'n Summ. J. 1.)

[7] Said passenger, Tiffany Flores, confirmed to police that Plaintiff had been looking into garage windows in the area. (SUF ¶ 45.)

[8] Although Plaintiff has submitted a "Concise Statement of Disputed Material Facts in Response to Defendants' Motion for Summary Judgment" (ECF No. 56-1), he has provided no citations to the record in support of his "facts." Notwithstanding the longstanding edict that *pro se* plaintiffs are responsible for following all applicable practices, policies and rules of the court (as further outlined in the "Notice of Guidelines for Representing Yourself (Appearing "Pro Se") in Federal Court" that was sent to Plaintiff on February 8, 2019), Plaintiff was specifically informed of this Court's requirement of pinpoint citations to the record when preparing a Concise Statement of Undisputed Facts or a Response thereto. (ECF No. 51); *see also Millhouse v. United States,* No. 1:19-cv-00665, 2021 U.S. Dist. LEXIS 110510, at *13, n.3 (M.D. Pa. June 14, 2021) (granting a defendant's Motion for Summary Judgment on the basis that "[t]he Court . . . will only consider those facts presented by Plaintiff that are properly supported by record citations."); *Guidotti v. Colvin*, Civil Action No. 15-186J, 2017 U.S. Dist. LEXIS 8496, at *3 (W.D. Pa. Jan. 23, 2017)

well-settled that "[i]n response to a summary judgment motion, a litigant cannot rely on suspicions, simple assertions, or conclusory allegations. Nor can a summary judgment motion be defeated by speculation and conjecture, ***or conclusory, self-serving affidavits***." *Parker v. Sch. Dist. of Phila.*, 823 F. App'x 68, 72 (3d Cir. 2020) (emphasis added). "[W]hile pro se complaints are entitled to liberal construction, the plaintiff must still set forth facts sufficient to survive summary judgment." *Morley v. Phila. Police Dep't*, Civil Action 03-880, 2004 U.S. Dist. LEXIS 12771, at *12 (E.D. Pa. July 7, 2004) (quoting *Wilson v. Squirrel*[,] Civil Action No. 00-3819, 2001 U.S. Dist. LEXIS 913, at *8 (E.D. Pa. Jan. 29, 2000) (citations omitted)). "[W]here a pro se litigant is given every opportunity to functionally respond in some meaningful way to a summary judgment motion and fails to do so, a movant who has met his burden of proof shall be entitled to summary judgment in his favor." *Regelman v. Weber*, Civil Action No. 10-675, 2012 U.S. Dist. LEXIS 140398, at *6 (W.D. Pa. Sept. 28, 2012) (citations omitted). To that end, "[t]his Court is not 'required to accept unsupported, self-serving testimony as evidence sufficient to create a jury question.'" *Hammonds v. Collins*, Civil No.: 12-CV-00236, 2016 U.S. Dist. LEXIS 52960, at *8 (M.D. Pa. April 20, 2016).[9]

("[P]ro se litigants 'must abide by the same rules that apply to all other litigants.'") (quoting *Mala v. Crown Bay Marina. Inc.*, 704 F.3d 239, 245 (3d Cir. 2013)).

[9] During his deposition, Plaintiff repeatedly referred to a video his fiancé (Tiffany Flores) took at the time of the incident, using Plaintiff's phone. (Gentles Dep. 34:20-25; 35:1-6; 37:15-25; 38:1-12; 42:15-25; 43:1-8; 55:15-25; 56:9-3; 59:8-11; 63:11-14; 76:5-18.) When questioned about the existence of the video, Plaintiff responded "The video exists. I just have to find the video. And I think I'll find it. So it definitely exists, because there was a recording of Officer Portock pointed out in his thing that Tiffany was recording the whole time. So it was—*and the video was sent to numerous people*." (Gentles Dep. 76:5-25) (emphasis added); *see also* Gentles Dep. 78:4-25. Plaintiff further testified there were *additional videos* taken by other individuals. (Gentles Dep. 56:14-25; 57:1-25; 58:1-10; 59:1-11.) Despite discovery requests and plenty of time (1,039 days) to do so, Plaintiff never produced *any* of these videos to substantiate his claims.

In view of the foregoing, Defendants' Motion for Summary Judgment on Plaintiff's Section 1983/Fourth Amendment claim shall be granted.[10]

B. Malicious Prosecution

In order to state a claim for malicious prosecution under Pennsylvania law, a plaintiff must show : "(1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice." *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 791 (3d Cir. 2000). "Actual malice in the context of malicious prosecution is defined as either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." *Wagner v. Waitlevertch*, 774 A.2d 1247, 1253 (Pa. Super. 2001). "Malice may be inferred from the absence of probable cause . . . [which] is proof of facts and circumstances that would convince a reasonable, honest individual that the suspected person is guilty of a criminal offense." *Lippay v. Christos*, 996 F.2d 1490, 1502 (3d Cir. 1993).

In this case, it is undisputed that Plaintiff was charged with "Disorderly Conduct - Unreasonable Noise" for the March 1, 2017 incident. (SUF ¶ 53.) On April 3, 2017, a hearing was held in Magisterial District Judge Edward C. Kropp's office. (SUF ¶ 54.) Although Plaintiff apparently failed to appear at the April 3, 2017 hearing,[11] Plaintiff subsequently appeared before the court on June 12, 2017, at which time he received a not guilty verdict on the charge. (SUF ¶¶

[10] Although Defendants raise the issue of immunity, the same is rendered moot by reason of this Court's finding on Plaintiff's Fourth Amendment claim.

[11] This Court notes that Plaintiff does not dispute Paragraph 55 of Defendants' Statement of Undisputed Facts, which states Plaintiff was found guilty at the April 3, 2017 listing. (RSUF ¶¶ 1-16.) However, for the reasons set forth in Note 2 herein, this Court relies upon the not guilty verdict rendered on June 12, 2017.

55-56.) As such, this Court finds the criminal proceeding ended in Plaintiff's favor. However, as discussed above, Plaintiff has failed to put forth any evidence of record to dispute the fact Defendant conducted a lawful *Terry* stop.[12] Plaintiff has also failed to adduce any evidence to establish he was compliant with the request to identify himself, or that he did not respond to Defendant Portock in a "very assertive tone" and use explicit language with the officer. (SUF ¶¶ 26-27.)[13] As such, the fact that there was probable cause to initiate the proceeding is not in dispute and there can be no finding of malice.

Accordingly, Defendants Motion for Summary Judgment on Plaintiff's Malicious Prosecution claim shall be granted.[14]

C. Punitive Damages

Punitive damages are available against individual Section 1983 defendants, not working in their official capacities, when their "conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983); *see also Savarese v. Agriss*, 883 F.2d 1194, 1204 (3d Cir. 1989).

Inasmuch as: (1) Defendant Unruh was not involved in the March 1, 2017 incident; (2) Defendant Portock was working in his official capacity when he conducted a *Terry* stop with Plaintiff; and, (3) this Court has found said stop to be justified, Plaintiff cannot recover punitive

[12] Plaintiff concedes "Defendant's [sic] were entitled to conduct a limited Terry Stop." (Pl.'s Opp'n Summ. J. 4.)
[13] Instead, Plaintiff simply disputes this fact by stating denying the use of expletives and concluding "Plaintiff never screamed or raised his voice ***to the extent it could be considered a public nuisance or public disturbance***." (RSUP ¶¶ 2-4.) Conclusions of law do not constitute evidence of record.
[14] Although Defendants raise the issue of immunity, the same is rendered moot by reason of this Court's finding on Plaintiff's Malicious Prosecution claim.

damages. Accordingly, Defendants' Motion for Summary Judgment on Plaintiff's demand for Punitive Damages shall be granted.

V. CONCLUSION

For the reasons set forth hereinabove, Defendants' Motion for Summary Judgment shall be granted in its entirety.

An appropriate Order follows.

BY THE COURT:

/s/ C. Darnell Jones, II J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEKEMA GENTLES *Plaintiff,*	:	
v.	:	
JEFFREY PORTOCK, *the Borough of Pottstown Police Officer(s), sued in both personal and official capacities*; UNRUH, *the Borough of Pottstown Police Officer(s), sued in both personal and official capacities*; and, UNIDENTIFIED OFFICER, *the Borough of Pottstown Police Officer(s), sued in both personal and official capacities* *Defendants.*	: : :	CIVIL ACTION NO. 19-0581

ORDER

AND NOW, this 29th day of September 2022, upon consideration of Defendants' Motion for Summary Judgment (ECF No. 52); Defendants' Statement of Undisputed Material Facts (ECF No. 53); Plaintiff's Opposition to Defendants' Motion (ECF No. 56); Defendants' Response to Plaintiff's Concise Statement (ECF No. 57); and, Plaintiff's Sur-Rebuttal to Defendants' Objections to Plaintiff's Disputed Material Facts (ECF No. 58), it is hereby ORDERED as follows:

(1) Defendants' Motion (ECF No. 52) is GRANTED;

(2) Judgment is GRANTED IN FAVOR OF DEFENDANTS PORTOCK and UNRUH and AGAINST PLAINTIFF SEKEMA GENTLES;

(3) Plaintiff's Motion to Expedite Disposition (ECF No. 59) is DENIED as Moot; and,

(4) The Clerk of Court shall mark this matter CLOSED.

BY THE COURT:

/s/ C. Darnell Jones, II J.

United States District Court for the Eastern District of Pennsylvania

Sekema Gentles, Plaintiff v. Borough of Pottstown, Jeffery Portock and Unruh Defendants	Civil Action No. 2:19-cv-0581 Notice of Appeal

Notice is hereby given that Sekema Gentles, Plaintiff in the above named case, hereby appeal to the United States Court of Appeals for the Third Circuit from an order dismissing Plaintiff's Civil Rights Complaint, pursuant to Defendant's Motion for Summary Judgment on September 29, 2022. (filing fee will be paid before the expiration of the time to file notice of appeal October 29, 2022, due to filing both this appeal and Notice of Appeal at 1199 after hours on October 11, 2022).

Sekema Gentles, Pro Se
9 W. Fourth Street
Pottstown, PA 19424

CERTIFICATE OF SERVICE

I, Sekema Gentles, Plaintiff herein, do hereby certify that on this day a true and correct copy of Plaintiff's Notice of Appeal was served by process of first class mail, postage prepaid, addressed as follows:

SIANA, BELLWOAR & McANDREW, LLP

Sheryl L. Brown, Esquire, I.D. #59313
Gregory R. Hennessy, Esquire, I.D. #323411
Attorney for Defendants, *Borough of Pottstown,*
941 Pottstown Pike, Suite 200
Chester Springs, PA 19425
(P): 610.321.5500 / (F): 610.321.0505
slbrown@sianalaw.com

Dated: 11 October 2022

Sekema Gentles

Sekema Gentles, pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEKEMA GENTLES,	:	
	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	**NO. 19-581**
BOROUGH OF POTTSTOWN, et al.	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 10th day of October, 2023, upon consideration of Plaintiff Sekema Gentles's Motion for Relief Pursuant to Rule 60(b)(3) (Doc. No. 68), Defendants' Response (Doc. No. 71), and Plaintiff's "Sur Rebuttal" (Doc. No. 72), I find the following:

Procedural Background

1. Plaintiff commenced this action in February 2019 against the Borough of Pottstown, as well as several Pottstown police officers and officials, arising out of an allegedly unlawful arrest. The case was originally assigned to the Honorable C. Darnell Jones. Following rulings on motions to dismiss, Plaintiff's claims were limited to a Fourth Amendment violation, a state law claim for malicious prosecution, and a request for punitive damages against Defendant Officers Portock and Unruh.
2. After the close of discovery, Defendants filed a motion for summary judgment. In a Memorandum Opinion dated September 29, 2022, Judge Jones found that Defendants were entitled to summary judgment on all remaining claims. Plaintiff appealed that decision, but the appeal was dismissed on November 23, 2022, for failure to timely prosecute.
3. On March 17, 2023, Plaintiff filed the current Motion for Relief Under Rule 60(b)(3), attaching a video recording—taken from Plaintiff's cell phone—of a portion of the incident in question. Defendants oppose this Motion.

Factual Background

4. The factual background was set out at length in Judge Jones's September 2022 Memorandum Opinion, as follows:

> Defendant Portock is a full-time police officer with the Borough of Pottstown Police Department. On March 1, 2017, Defendant Portock was dispatched to the area of 30 West 5th Street in Pottstown, Pennsylvania for a report of suspicious activity. Dispatch informed Defendant Portock that a black male, operating a white Honda sedan bearing a registration of JDM-1017, was looking into garage windows in a suspicious manner. Acting on information received, Defendant Portock arrived at the area of 30 West 5th Street, Pottstown, Pennsylvania at 17:30 hours. Unable to locate the vehicle, Defendant Portock cleared the call at 17:31 hours. However, approximately 11 minutes later, during routine patrol, said Officer observed the subject white Honda at the intersection of Chestnut and North Evans Streets. Plaintiff, a Black male, had parked his white Honda at this location and was observed standing next to the vehicle. The white Honda sedan bore the same registration as the vehicle identified in the dispatch call. Defendant Portock parked his patrol vehicle and advised dispatch of his location. At this time, Plaintiff was standing outside his car, speaking to an individual identified as Mario Barber. Plaintiff observed a police officer pull up in a marked car. Because Plaintiff was on parole, he did not want to be around any "police involvement." Defendant Portock said "hey there" to Plaintiff, at which point Plaintiff waved to the officer. However, when Defendant Portock informed Plaintiff that he needed to speak to him and that he was under investigation, Plaintiff got into his car and started the ignition. Defendant Portock asked Plaintiff for identification, however, Plaintiff refused to provide same because he did not believe he was under any obligation to do so. Defendant Portock again advised Plaintiff he was conducting an investigation and informed Plaintiff that the law required him to provide identification. Plaintiff responded in a "very assertive tone" and began using explicit language as he again refused to provide his identification. Defendant Portock advised dispatch that the driver

was being uncooperative and requested another unit on the scene. While Plaintiff was sitting in his car, Defendant Portock again advised him he was under investigation and requested that he provide his identification. An additional officer arrived on the scene, as children were approximately twenty feet away and neighbors watched the incident. Plaintiff exited his vehicle and stood by the driver's door, while Defendant Portock was approximately ten to fifteen feet away, speaking with the other officer. When Defendant Portock returned to Plaintiff, he proceeded to handcuff him and search his person for identification. At no time did Defendant Portock pull his weapon on Plaintiff. Plaintiff's wallet was removed and Defendant Portock located Plaintiff's identification. Once identified, Plaintiff was placed in the back of Defendant Portock's patrol vehicle.

As Plaintiff sat in the back of the police vehicle, Defendant Portock approached a female passenger who had been sitting in Plaintiff's car, in order to identify her and inquire into the basis of the dispatch report. Sergeant Michael Ponto arrived at the scene and positively identified the female passenger as Tiffany Flores. Both Defendant Portock and Sergeant Ponto explained several times that [Plaintiff] was required to identify himself. It was explained to Ms. Flores that the vehicle was stopped due to a report of suspicious activity involving a Black male, operating a white Honda sedan with Plaintiff's registration number, looking into garage windows. Ms. Flores confirmed she and Plaintiff were buying a house in the area and had been looking into garage windows. After obtaining information from Tiffany Flores, Defendant Portock returned to the patrol vehicle to speak to Plaintiff, remove the handcuffs, release him from the patrol vehicle, and inform him he would be receiving a citation for Disorderly Conduct in the mail.

Plaintiff had been in the police vehicle approximately 20 minutes. Defendant Portock and Sergeant Ponto were the only Pottstown Police Department Officers present at the scene.

On March 15, 2017, a Citation charging Plaintiff with "Disorderly Conduct - Unreasonable Noise" was filed and a Summons was issued the following day. On April 3, 2017, a

> hearing was held in Magisterial District Judge Edward C. Kropp's office. However, Plaintiff failed to appear for the April 3, 2017 hearing. Plaintiff did appear before the court on June 12, 2017, at which time he received a not guilty verdict on the charge.

Gentles v. Portock, No. 19-cv-581, 2022 WL 4586136, at *1–2 (E.D. Pa. Sept. 29, 2022) (internal citations omitted).

5. Based on this record, Judge Jones found that (a) Defendant Portock was justified in briefly detaining Plaintiff until he could obtain Plaintiff's identification and acquire more information from the passenger of Plaintiff's car, and (b) Defendant Unruh was not involved in this matter. Judge Jones also determined that because there was probable cause to initiate a disorderly conduct charge against Plaintiff, the malicious prosecution claim should be dismissed.

Discussion

6. Rule 60(b) provides that the "court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party[.]" Fed. R. Civ. P. 60(b)(3).

7. Rule 60(b)(3) does not provide much guidance regarding its application. In Brown v. Pennsylvania Railroad Company, 282 F.2d 522 (3d Cir. 1960), the United States Court of Appeals for the Third Circuit stated that "[i]n order to sustain the burden of proving fraud and misrepresentation under Rule 60(b)(3), the evidence must be clear and convincing." Id. at 527; see also Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir.1988) (noting need for "clear and convincing evidence" under 60(b)(3)). Subsequently, in Stridiron v. Stridiron, 698 F.2d 204 (3d Cir.1983), the Third Circuit instructed that "[t]o prevail [under Rule 60(b)(3)], the movant must establish that [1] the adverse party engaged in fraud or other misconduct, and [2] this conduct prevented the moving party from fully and fairly presenting his case." Id. at 207; see also Floorgraphics Inc. v. News Am. Mktg. In-Store Servs., Inc., 434 F. App'x 109, 111–12 (3d Cir. 2011).

8. Here, Plaintiff contends that he was only recently able to recover a video of the incident in question. He claims that the video—which was recorded on his phone—had been lost when Plaintiff changed phones, but it recently "resurfaced" after he accessed an old Google account and found it in cloud storage. The discovery purportedly occurred on February 28, 2023, and the Motion was filed on March 17, 2023.

9. Plaintiff asserts that this newly-discovered video reveals that Defendant Portock committed perjury in several statements:

    - In his October 15, 2021 Declaration submitted in connection with Defendants' Motion for Summary Judgment, Officer Portock stated that "[f]ormer Pottstown Borough Police Officer Brandon Unruh was not involved in the March 1, 2017 incident involving the named Plaintiff, Sekema Gentles." (ECF No. 53, p. 8.) The video, however, shows that Officer Unruh was, in fact, present at the scene and actually handcuffed Plaintiff.

    - In his Police Incident Report, Officer Portock stated that, when he asked Plaintiff for his ID, Plaintiff "became belligerent toward me by cursing saying, "I don't need to give you my mother fucking ID!'" (ECF No. 53, p. 12.) During the portion of the incident on video, however, Plaintiff did not use those precise words in refusing to hand over his identification, and, although Plaintiff later cursed, Officer Portock was not present.

    - In the same Police Incident Report, Officer Portock stated that once it was clear that Plaintiff would not identify himself, Portock "ordered him to exit the vehicle. I then detained [Plaintiff] by handcuffing him, searching him." (ECF No. 53, p. 13.) In the video, however, Plaintiff is seen exiting the vehicle seemingly of his own accord and not at the order of Officer Portock.

    - Nothing in Officer Portock's Declaration or Police Incident Report mentions his threats to Plaintiff's fiancée that they could arrest her too and take her children, who were in the back of the car, into custody. The video shows that that threat was, in fact, made to Plaintiff's fiancée when she also declined to hand over her identification.

    Plaintiff argues that given these "minor discrepancies," this case should be reopened and tried before a jury. (Pl.'s Mot. 4.)

10. Having viewed the video in its entirety several times, I find that Plaintiff's argument does not meet the standard for relief under Rule 60(b)(3). First, Plaintiff has failed to establish that Defendants engaged in fraud or other misconduct. The video begins after the interaction between Portock and Plaintiff already commenced and, as such, I do not have the benefit of seeing precisely what

precipitated the first verbal exchange. At the point where the video starts, Defendant Portock is seen repeatedly and calmly asking Plaintiff to produce his ID due to a "criminal investigation" into the car that Plaintiff was driving. Plaintiff then declines to produce his ID for the officer and rejects any notion that he could be part of a criminal investigation. At some point, Plaintiff steps out of the car, but it is not clear based on the video whether he was ordered out or whether Plaintiff voluntarily exited. In either event, these facts are, as Plaintiff himself characterizes, "minor discrepancies."

11. As to the statement in Officer Portock's Declaration that Officer Unruh was not present at the scene, it is true that the video clearly shows Officer Unruh's presence among multiple other officers. However, as Defendant observes, Officer Portock's Declaration was executed in connection with this lawsuit, four years after the incident, during the summary judgment phase. Officer Portock avers only that Officer Unruh "was not involved" in the incident. The video confirms that Officer Unruh was not initially at the scene by showing him speaking to Plaintiff's fiancée, explaining that he did not know the precise basis of the stop because, as she saw, he was not present at the inception of the call. Indeed, the video shows no verbal interactions between Plaintiff and Unruh or Portock and Unruh. Accordingly, while Officer Portock's Declaration was incorrect, nothing in the video suggests that it was a product of fraud, perjury, or some other misconduct rather than mere mistake.

12. The absence of any mention in the Police Incident Report of Officer Portock's statement regarding taking the children into their custody if they had to arrest Plaintiff's fiancée does not constitute a material omission arising to the level of fraud. The video shows Officer Portock requesting her ID and explaining the potential consequences if she did not.

13. Second, even assuming *arguendo* that Officer Portock had committed perjury or other fraud, Plaintiff has not established the second Rule 60(b)(3) element—that such conduct prevented him from fully and fairly presenting his case. Even if Judge Jones had the benefit of viewing the video

prior to ruling on summary judgment motions, nothing in that video would have altered the validity of the legal decision. See Bandai Am. Inc. v. Bally Midway Mfg. Co., 775 F.2d 70, 73–74 (3d Cir. 1985) (denying Rule 60(b)(4) motion where the misrepresentations relied upon were not material to the outcome of the litigation).

14. Judge Jones found that Officer Portock properly conducted a permissible investigatory stop under Terry v. Ohio, 392 U.S. 1, 30 (1968) based on a reasonable, articulable suspicion that "criminal activity may be afoot." Id. Nothing in the video undermines the factual basis of this legal determination. Quite to the contrary, it reflects Officer Portock calmly requesting Plaintiff's identification based on a criminal investigation involving Plaintiff's car, and Plaintiff's adamant refusal to provide that identification. The video also shows numerous witnesses to this interaction.

15. Moreover, Judge Jones determined that Officer Portock had probable cause to initiate criminal proceedings against Plaintiff for "Disorderly Conduct – Unreasonable Noise"—a finding that is borne out by the video showing Plaintiff's refusal to provide identification, use of loud and assertive language involving expletives, and subsequent yelling in the street in front of neighborhood residents.

WHEREFORE, it is hereby **ORDERED** that Plaintiff's Motion for Relief Pursuant to Rule 60(b)(3) is **DENIED**. The Clerk of Court shall mark this case **CLOSED**.

BY THE COURT:

/s/ Mitchell S. Goldberg
MITCHELL S. GOLDBERG, J.