

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

SGT. BRIAN T. POPE,

Appellant,

v.

CLAYTON HULBERT, AS
PERSONAL REPRESENTATIVE
OF THE ESTATE OF JEFFREY
HULBERT, ET AL.,

Appellees.

* * * * *

**DEFENDANT-APPELLANT SGT. BRIAN T. POPE'S
MEMORANDUM ON JURISDICTION**

Defendant-Appellant Sgt. Brian T. Pope, through his attorneys, submits this memorandum addressing jurisdiction, as ordered by this Court on August 18, 2021. ECF 22 (4th Cir.). This Court has jurisdiction to consider the appeal because a timely notice of appeal confers jurisdiction on this Court. The district court also has jurisdiction to consider the motion for reconsideration because a district court does not lose jurisdiction to proceed as to matters in aid of the appeal. It would aid in this appeal for briefing to be suspended, and for the district court to be ordered to lift its stay and rule on the pending motion for reconsideration.

BACKGROUND

Plaintiffs' Suit Against Sgt. Pope for Arresting Protestors Who Failed to Move Fewer Than Fifteen Feet for Safety Reasons

The plaintiffs-appellees, Jeff Hulbert,¹ Kevin Hulbert, and Maryland Shall Issue, Inc., sued defendant-appellant Sergeant Brian T. Pope and others for alleged constitutional violations and common law torts arising from the arrest of the Hulberts by Sgt. Pope, an officer of the Maryland Capitol Police. ECF 1 (D. Md.).

The District Court's Partial Grant and Partial Denial of Sgt. Pope's Motion for Summary Judgment

Sgt. Pope moved for summary judgment on grounds that included an assertion that Sgt. Pope was entitled to qualified immunity. ECF 76 (D. Md.). On April 22, 2021, the motion was granted as to six of the ten claims against Sgt. Pope, but otherwise denied. ECF 88, 89 (D. Md.). Four claims under 42 U.S.C. § 1983 survived summary judgment, including three First Amendment claims (violation of right to demonstrate and right to film law enforcement officers, plus retaliation) and a Fourth Amendment claim (unconstitutional search and seizure). ECF 88, 89 (D. Md.).

Sgt. Pope's Timely Motion for Reconsideration

Sgt. Pope filed a timely motion for reconsideration on May 7, 2021. ECF 91; *see* Local Rule 105.10 (D. Md.) (“Except as otherwise provided in Fed. R. Civ.

¹ Jeff Hulbert passed away earlier this year and his estate has substituted its appearance.

P. 50, 52, 59, or 60, any motion to reconsider any order issued by the Court shall be filed with the Clerk not later than fourteen (14) days after entry of the order.”). The motion was not opposed by the plaintiffs-appellees. Because a motion for reconsideration of a partial summary judgment ruling is not among the motions listed in Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure, the filing of a motion for reconsideration did not extend the time for filing a notice of appeal. *See American Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4th Cir. 2003) (“[A]n order of partial summary judgment is interlocutory in nature,” and “[m]otions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of a final judgment” under Fed. R. Civ. P. 59(e) or 60(b)).

Sgt. Pope’s motion for reconsideration raises two primary arguments. First, Sgt. Pope argues that, given the undisputed facts as found by the district court, he is entitled to summary judgment. In support of the motion, Sgt. Pope has provided video evidence to resolve an alleged dispute of fact identified by the court. In making this argument, the motion for reconsideration first highlights the findings of fact made by the district court, which support a conclusion that Sgt. Pope is entitled to qualified immunity, including “that the Hulbert brothers and approximately six other people were holding large signs in the middle of a fifteen- and one-half-foot walkway,” “[i]t was dark, and the Maryland legislative session

was expected to convene within a few hours.” ECF 88 at 15 (D. Md.). Moreover, pedestrians had previously been struck by vehicles at this intersection, but unlike those prior incidents that occurred during daylight hours in June, these protestors were at the intersection in the dark, in February, while the Maryland legislature was in session, *see* ECF 88 at 15, 17 (D. Md.). (The legislative session tends to increase significantly pedestrian and vehicular traffic on Annapolis streets near the State House.) A law enforcement officer’s duty necessarily involves anticipating threats to safety and guarding against them, rather than waiting until someone has already “caused a security issue.” *Kass v. City of New York*, 864 F.3d 200, 209 (2d Cir. 2017); *see* Memorandum Opinion, ECF 88 at 12, 15 (citing *Kass*). Sgt. Pope’s motion for reconsideration notes that the district court’s findings of fact are consistent with, and supported by, the Capitol Police case report. All of these facts, found by the district court to be undisputed, weigh in favor of granting summary judgment to Sgt. Pope.

Sgt. Pope’s motion for reconsideration addresses the alleged dispute of fact that the district court cited as a reason for denying summary judgment, which is “whether any of the Patriot Picket members were in the street or crosswalks prior to Sgt. Pope ordering the group to move.” ECF 88 at 17 (D. Md.). Though, in Sgt. Pope’s view, the alleged dispute of fact is immaterial to the outcome of the qualified immunity analysis, the motion for reconsideration supplies video

evidence to resolve the alleged dispute of fact, along with an explanation of the reasons that prevented Sgt. Pope from submitting this additional video evidence when he filed the motion for summary judgment. Memorandum of Law in Support of Motion for Summary Judgment, ECF 76-1 at 6, n.6 (D. Md.) (citing to different video evidence and explaining that “the lengthier surveillance video depicts demonstrators regularly using the crosswalks”); Motion for Reconsideration, ECF 91 at 2, n.1 (D. Md.) (stating “[c]ounsel has been having technical difficulties preparing a link or shared drive to serve at the method of citing to the video As a result of ongoing technical difficulties—and that today is the due date for the filing of a motion for reconsideration—the video will be put onto a DVD on Monday for filing and service”); Motion for Leave to File Electronic Video File in Physical Format, ECF 93 (D. Md.); Affidavit of Scott Beckman, Director of Information Technology, ECF 18-2 (4th Cir.) (explaining (1) that the surveillance footage depicting the demonstration prior to and during the arrest that gave rise to this action cannot be converted to a format approved by the district court given the proprietary nature of the video format, and (2) that a recording of the video—not the video itself—was created in a format acceptable to the district court by playing the video and recording it with a screen capture feature); Cover Letter to the District Court Clerk Filing the Physical Exhibit, ECF 18-3 (4th Cir.). If the district court believed that the need for resolution of the alleged dispute of fact posed an

obstacle to summary judgment, then the video evidence should be sufficiently conclusive.

As its second argument, the motion for reconsideration asserts that the district court should have considered, but did not address, alternative offenses for which Sgt. Pope had probable cause to arrest the Hulberts. The district court focused solely on Sgt. Pope's citation of the Hulbert brothers for failure to obey a lawful order, *see* ECF 88 at 27 (D. Md.), but Sgt. Pope also arrested them for obstructing sidewalks. ECF 76-4 at 70-71, 76-80 (D. Md.); ECF 88 at 4 (D. Md.) ("Sgt. Pope had also intended to write them a citation for blocking the public sidewalk."). Moreover, several officers and an assistant state's attorney believed the facts called for additional charges, including for trespass. ECF 76-4 at 76-80 (D. Md.); ECF 76-5 at 33 (D. Md.); ECF 76-7 at 48-49 (D. Md.); ECF 76-17 at 12-20 (D. Md.); ECF 76-19 at 3-4 (D. Md.); ECF 87-6 at 2-3 (D. Md.); ECF 88 at 24, 32 (D. Md.). "The proper focus of the [probable cause] inquiry is not any subjective reason for arresting [the plaintiff], but only the objective facts surrounding the arrest," and "the 'subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.'" *Pegg v. Herrnberger*, 845 F.3d 112, 119 (4th Cir. 2017) (quoting *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)). Given that several officers and an assistant state's attorney felt the same facts warranted a additional criminal citations, there

was probable cause for the arrest or, at least, Sgt. Pope made the kind of “reasonable mistake” to which qualified immunity applies. *Merchant v. Bauer*, 677 F.3d 656, 661 (4th Cir. 2012); *see also Wadkins v. Arnold*, 214 F.3d 535, 541-42 (4th Cir. 2012) (holding that a prosecutor’s authorization of charges weighs “heavily toward a finding that [the officer] is immune” and it “is compelling evidence and should appropriately be taken into account in assessing the reasonableness of [an officer’s] actions.”) (emphasis in original)).

Sgt. Pope’s Timely Notice of Interlocutory Appeal

Sgt. Pope noticed this timely interlocutory appeal on May 20, 2021, less than 30 days after entry of the district court’s April 22, 2021 order disposing of the motion for summary judgment. ECF 94 (D. Md.); *see* Fed. R. App. P. 4(a)(1)(A). The district court had jurisdiction to consider the constitutional and common law tort claims below under 28 U.S.C. §§ 1331, 1343, and 1367. This Court has jurisdiction to review the district court’s collateral order under 28 U.S.C. § 1291. *See Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014) (holding that “pretrial orders denying qualified immunity generally fall within the collateral order doctrine”).

Although the appellant’s brief has not been filed, Sgt. Pope intends to present three questions for this Court to consider. He will argue that the district court committed a fundamental error in applying the law when it misconstrued the materiality of certain alleged factual disputes. *Johnson v. Caudill*, 475 F.3d 645,

649-50 (4th Cir. 2007) (holding that “[i]f . . . resolution of the factual dispute is immaterial to whether immunity should be afforded, the underlying legal question about whether immunity is to be afforded remains and may be appealed under *Mitchell* [*v. Forsyth*, 472 U.S. 511 (1985)] as a collateral order.”). As in the motion for reconsideration, Sgt. Pope will also argue that the district court erred when it failed to consider an alternative basis for summary judgment based on whether Sgt. Pope had probable cause to arrest. With respect to Kevin Hulbert’s claims, Sgt. Pope will argue that the district court erred when it concluded that the right to film law enforcement was a clearly established right under the First Amendment, despite the absence of any pertinent precedent from the Supreme Court, this Court, or the Court of Appeals of Maryland.

The district court’s resolution of the motion for reconsideration would likely affect this appeal. If the motion were granted, then the appeal would likely be dismissed or, at least, present fewer questions for this Court to consider. If the motion were denied, then Sgt. Pope would likely file a new notice of appeal from the district court’s ruling on the motion for reconsideration. Instead of ruling on the motion, the district court—on its own initiative—has entered an order staying the case “pending the outcome of the interlocutory appeal.” ECF 98 (D. Md.).

ARGUMENT

I. THIS COURT HAS JURISDICTION TO PROCEED ON APPEAL WHILE THE MOTION FOR RECONSIDERATION IS PENDING IN THE DISTRICT COURT.

In this appeal, Sgt. Pope intends to ask this Court to review several aspects of the district court's decision partially denying summary judgment on the basis of qualified immunity. Sgt. Pope filed a timely notice of interlocutory appeal, which "is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam).

II. THE DISTRICT COURT ALSO HAS JURISDICTION TO RULE ON THE MOTION FOR RECONSIDERATION WHILE THIS APPEAL IS PENDING.

The general rule—"that the filing of a timely and sufficient notice of appeal immediately transfers jurisdiction of all matters related to the appeal from the district court to the court of appeals"—"is not absolute." *Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188, 1190 (4th Cir. 1991). There are exceptions. One such exception "is that a district court does not lose jurisdiction to proceed as to matters in aid of the appeal." *Id.*; see also *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 890 (4th Cir. 1999) (concluding that a district court ruling on a Rule 60(b) motion is "in aid of the appeal," in part because "the district court, which has lived with a case and knows it well, is far better situated than an

appellate court to determine quickly and easily the possible merit of a Rule 60(b) motion.”) This exception is a “judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time.” *Grand Jury*, 947 F.2d at 1190 (citations omitted).

The issues presented in the motion for reconsideration and that will be presented in this appeal do not overlap completely, but they do potentially impact one another. Most notably, the district court declined to grant summary judgment on the four remaining claims due to an alleged dispute of fact concerning whether people were in the streets and crosswalks. ECF 88 at 17 (D. Md.). Sgt. Pope would argue in this Court, among other things, that the alleged dispute of fact is immaterial to the qualified immunity analysis. Whether it is material or not, however, the motion for reconsideration provides surveillance video, giving the district court an opportunity to resolve the alleged dispute of fact it has identified. To the extent that the district court considered this dispute of fact relevant to its analysis of qualified immunity, the district court would have an opportunity to rule on it. If the district court grants Sgt. Pope qualified immunity based on this video, then the need for the appeal is likely eliminated. If, notwithstanding the video evidence showing protesters using the streets and crosswalks, the district court still believes that summary judgment cannot be granted on qualified immunity grounds,

then this Court will have a cleaner and more complete record on which to base appellate review.

If this Court considers the appeal without a ruling from the district court on the motion for reconsideration, then it is possible that this case will return on appeal in the very near future. If this Court were to proceed to decide the appeal, reject some or all of Sgt. Pope's arguments, and remand the case to the district court, then the district court would subsequently rule on the motion for reconsideration. Depending on how the district court rules, Sgt. Pope might have a renewed basis to seek interlocutory appeal.

The cleanest and most efficient method of resolving the issues in this case is to suspend briefing, and order the district court to lift its stay and rule on the pending motion for reconsideration. Depending on the outcome, the need for appeal could be eliminated, the issues on appeal could be narrowed, or, at a minimum, the appeal could have a more complete record for this Court to review.

CONCLUSION

The motion to suspend briefing should be granted, and the district court should be ordered to lift its stay and rule on the pending motion for reconsideration.

Respectfully submitted,

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September 1, 2021

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CERTIFICATE OF SERVICE

I certify that, on 1st day of September, 2021, the foregoing was filed electronically and served on counsel of record, who are registered CM/ECF users.

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