THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SHAWN WALDEN, Plaintiff, v. THE CITY OF DUNCAN, OKLAHOMA A municipal corporation, CHRISTIAN ARCHER, in his official and Individual capacity, Defendants.	)	Case No.: CIV-23-1075-PRW

DEFENDANT CHRISTIAN ARCHER'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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REPLY TO RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Defendant Christian Archer ("Officer Archer") hereby submits this brief in reply to Plaintiff's Response to Officer Archer's Motion for Summary Judgment (Doc. 47). As discussed in the motion and further herein, Officer Archer is entitled to summary judgment.

I. THERE IS NO GENUINE DISPUTE OF MATERIAL FACT

After reviewing the Plaintiff's Response to Officer Archer's facts, it is clear that every **material** fact identified in Officer Archer's Motion for Summary Judgment is expressly admitted or otherwise undisputed. Accordingly the following can be established:

Officer Archer was dispatched to the Chisolm Corner Store due to a report that a man inside the store, who would later be identified as Plaintiff, was acting suspiciously and had dropped a gun several times while inside the store. When Officer Archer interacted with Plaintiff, he observed that Plaintiff appeared lethargic. Officer Archer performed the horizontal gaze nystagmus test, a standardized field sobriety test, on Plaintiff. Officer Archer also had prior interactions with Plaintiff, during which Plaintiff had been under the influence of something and was belligerent. (Ex. 1, Deposition of Archer, 17:1-13)[1]. Based on his observations at the scene and during the field sobriety test, along with his knowledge of Plaintiff from previous interactions, Officer Archer determined that there was evidence to establish probable cause and continuing with the other field sobriety tests had a potential to put his safety at risk. (Ex. 1, Deposition of Archer 16:2-17:13).

[1] Officer Archer's Deposition is already included in its entirety as an exhibit to Plaintiff's Response to Officer Archer's Motion for Summary Judgement (Doc. 47-5). For the Court's convenience, Officer Archer reattaches only the pages he relies on as an exhibit to his reply.

Plaintiff does not dispute that Officer Archer knew about Plaintiff's behavior in the store, that Plaintiff seemed lethargic, and that Officer Archer had interacted with Plaintiff previously and knew him to act erratic while under the influence. (Doc. 47, Plaintiff's Response to Defendant's Facts Nos. 4-6; 11-12). Plaintiff tries to negate these clear facts by claiming that Plaintiff was lethargic because he was tired and implying that Officer Archer's previous interactions with him are somehow irrelevant because there was not a written report about them at the time of the arrest. This is patently erroneous. When determining probable cause, an officer is allowed to consider the totality of the circumstances, including the officer's previous interactions with the individual. *United States v. Phillips*, 71 F.4th 817, 823 (10th Cir. 2023) (finding it reasonable that an officer considered his previous interactions with a suspect as part of his basis for initiating a traffic stop). The fact that Officer Archer did not write down his previous interaction with Plaintiff does not mean he cannot consider those observations. Plaintiff has not, and cannot, offer any authority to the contrary sufficient to defeat summary judgment on this point.

Plaintiff also admits that Officer Archer and other officers on the scene, observed nystagmus[2], as well as circular swaying, tremors in Plaintiff's chest, shoulder, and arms, and slurred speech. (Doc. 47, Plaintiff's Response to Defendant's Facts 9-10; Plaintiff's Fact 27). But Plaintiff claims that none of these indicators of intoxication were actually observable, and thus they must not exist. As "support" for every fact in which he claims

[2] Nystagmus is involuntary jerking of the eyes and lack of smooth pursuit of the stimuli. The presence of nystagmus is a common indication of intoxication. (Ex. 1, 16:2-20 28: 3-18; 30:13-20; 33:3-22)

that none of these indicators were observable he misrepresents testimony of Archer, cites to the affidavit of his "expert", cites to his own testimony, or cites to the transcript of Officer Archer's body cam footage. (Doc. 47, Plaintiff's Facts Precluding Summary Judgment 26-28;30). Each of these are problematic for their own reasons and will be addressed in turn.

First, Plaintiff claims, "Officer Archer admits that the circular swaying is not visible on his body cam footage" (Doc. 47, Plaintiff's Facts Precluding Summary Judgment 26). Officer Archer explained that the circular swaying was present on either Sergeant Lard or Officer Aguilera's body camera footage. (Ex. 1, Deposition of Archer, p. 40:14-22) This is not the "proof of dispute" that Plaintiff would like to believe it is. Officer Archer clearly testifies that the circular swaying is visible on other officers' body cam footage. Other officers also saw such swaying present while at the scene. (Doc 30-11; Doc 30-14). It is only Plaintiff's expert who claims that the circular swaying is not visible on the body cam footage. (Doc. 47, Plaintiff's Facts Precluding Summary Judgment 26).

Second, Plaintiff repeatedly cites an affidavit written by Plaintiff's expert, David Ballard, to support his conclusion that no indicator of intoxication was observable. These opinions include that the indicators Officer Archer saw were "not actually present or they were so insignificant as to not constitute a basis for a probable cause determination." (Doc. 47-8, ¶ 4); "no reasonable officer would rely on such claimed conditions as supporting a finding of intoxication by either alcohol or drugs" (Doc. 47-8, ¶ 4); and "from an objective standpoint, there was not an arguable basis to believe Mr. Walden was impaired by drugs or alcohol." (Doc. 47-8, ¶ 18). These statements amount to nothing more than conclusory

statements that attempt to bolster Plaintiff's version of events. It is well established that conclusory expert opinions, such as the ones offered in Mr. Ballard's affidavit, are not enough to raise a genuine issue of material fact. *Medina v. Cram*, 252 F.3d 1124, 1133 (10th Cir. 2001). Mr. Ballard's affidavit should not be considered.[3] *See City of Chanute, Kan. v. Williams Nat. Gas Co.*, 743 F. Supp. 1437, 1445 (D. Kan. 1990) (holding that an expert affidavit of conclusory statements is not enough to show a genuine issue of material fact.) *aff'd, City of Chanute, Kan. v. Williams Nat. Gas Co.*, 955 F.2d 641 (10th Cir. 1992)

Third, Plaintiff cites only to his own testimony to support his conclusion that indicators of intoxication, such as slurred speech, are not observable. (Doc. 47, Plaintiff's Facts Precluding Summary Judgment 28). As discussed below, Officer Archer and the other officers on the scene all testified that they observed indicators of intoxication. Plaintiff's version of the events is not enough to show a genuine dispute of material fact.

Finally, Plaintiff claims that no indicators of intoxication are actually observable on the body cam footage, and thus these indicators cannot serve as Officer Archer's basis for probable cause. However, Plaintiff does not submit any video or audio recording as an exhibit. He only submits a transcript of the body cam footage of Officer Archer. (Doc. 47-3). One cannot rely on a transcript to show things such as tremors or circular swaying. It makes little sense for Plaintiff to argue that one cannot observe any indicators of intoxication on the video without actually attaching the video as an exhibit.

[3] Additionally, as fully expounded upon in Defendants' Motion to Exclude the Testimony of Mr. Ballard, Mr. Ballard is not qualified to testify. Nor can he can he offer legal conclusions or define the applicable law, which is exactly what he attempts to do with this affidavit.

Plaintiff's lack of actual viable support for his claims means there is not enough evidence to create a dispute of material fact. While the Court must view the facts in the light most favorable to the moving party, this is only true if there is a "genuine" dispute of material fact. *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citing Fed. R. Civ. Pro. 56(c)). Meaning that a party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id*. (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–587 (1986) (footnote omitted). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.*

The Plaintiff's self-serving version of events is clearly contradicted by the record, especially when reviewing the video rather than solely relying on the interpretations of the Plaintiff and the Plaintiff's expert, as the Plaintiff does in his Response. The remainder of Plaintiff's facts are irrelevant, specifically his facts regarding the performance of the field sobriety test. Probable cause can exist even without a field sobriety test as probable cause is based on the totality of the circumstances presented to the officer. Thus, Plaintiff's facts regarding the performance of the field sobriety test do not preclude summary judgment. Rather, the undisputed material facts in the record clearly show that Officer Archer had ample evidence to establish probable cause to arrest the Plaintiff for driving while intoxicated and possessing a firearm while intoxicated.

II. THE "POST HOC" EVIDENCE CAN BE CONSIDERED.

Plaintiff claims that this Court must disregard multiple pieces of evidence, including the declarations of Officer Davidson and Officer Aguilera, who were both on the scene, in which they both state they also saw indicators of intoxication. (Doc 30-11; Doc 30-14). This argument is unsupported and should be disregarded. Plaintiff's basis for his argument is that Officer Archer did not know this information when he chose to arrest Plaintiff. While Officer Archer does not concede that Plaintiff's statement is accurate, this claim is irrelevant for the affidavits. The probable cause analysis considers the objective reasonableness of an officer's actions. *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2001). "[P]robable cause must be evaluated in light of the circumstances as they would have appeared to a prudent, cautious, trained police officer." *United States v. Edwards*, 242 F.3d 928, 934 (10th Cir. 2001). Thus, the observations of other officers on the scene are relevant as it supports the objective reasonableness of Officer Archer's determination.

III. THE UNDISPUTED FACTS ESTABLISH PROBABLE CAUSE.

Plaintiff's argument that there was not probable cause for arrest relies on his unsupported version of the facts. As addressed above, and in Officer Archer's underlying brief, the evidence in the record shows that Officer Archer knew Plaintiff had been in the store acting suspiciously and repeatedly dropping a gun. Officer Archer, and the other officers on the scene, visually observed Plaintiff swaying in a circular motion, exhibiting tremors, and with slurred speech. (Doc 30-11; Doc 30-14; Ex. 1, Deposition of Archer, 33:19-25; 43:8-15). These observations are more than enough for a reasonable officer to believe he had probable cause to arrest Plaintiff.

"Probable cause is not a high bar." *Hinkle v. Beckham Cnty. Bd. of Cnty. Commissioners*, 962 F.3d 1204, 1220 (10th Cir. 2020) (citing *Kaley v. United States*, 571 U.S. 320, 338 (2014) (internal quotation marks omitted)). "Probable cause to arrest exists where, under the totality of the circumstances, a reasonable person would believe that an offense has been committed by the person arrested." *United States v. Martin*, 613 F.3d 1295, 1302 (10th Cir. 2010). The Tenth Circuit has held that officers had probable cause to arrest someone for driving under the influence when the officer observes watery eyes, slurred or slow speech, unsteadiness, or a failed field sobriety test. *See Wilder v. Turner*, 490 F.3d 810, 814 (10th Cir. 2007); *U.S. v. Chavez*, 660 F.34d 1215, 1224 (10th Cir. 2011).

Plaintiff's claim that Officer Archer did not have probable cause is premised on his version of the facts and his claim that certain indicators of intoxication cannot be seen on the body cam footage. But Plaintiff does not even include body cam footage and instead cites to the transcript of such footage and to an affidavit of his "expert's" interpretation of such footage. As discussed above, this is not enough to create a genuine dispute of material fact, as the record clearly contradicts any claim that a reasonable officer would not believe they had probable cause. The record shows that multiple officers who were on the scene observed signs of intoxication, such as slurred speech, swaying, tremors, and nystagmus. (Doc 30-11; Doc 30-14; Ex. 1, Depo of Archer, 33:19-25; 43:8-15) Additionally, all officers on the scene believed there was probable cause to arrest Plaintiff. (Docs 30-6; 30-11; 30-14). Plaintiff cannot overcome these facts that clearly support probable cause.

Plaintiff next asserts that Officer Archer cannot be granted qualified immunity because in this scenario should be a "question of fact for the jury because it requires

decisions as to historical facts. However, Plaintiff fails to recognize that this is only to be utilized in exceptional circumstances when a disputed issue of material fact must be decided to determine qualified immunity. *Gonzales v. Duran*, 590 F.3d 855, 859 (10th Cir. 2009). This is because qualified immunity is meant to be "immunity from suit rather than a mere defense to liability." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The Supreme Court has repeatedly emphasized that questions involving qualified immunity should be resolved at the earliest possible stage. *Id*. at 232. When looking at this case, with the purpose of qualified immunity in mind, it is clear this is not an exceptional circumstance in which qualified immunity should be decided by the jury.

Plaintiff has given the Court no real reason to not grant qualified immunity to Officer Archer in this case. As this Court is aware, when a defendant asserts a qualified immunity defense the burden shifts to the Plaintiff to show that a constitutional right was violated and that the right was clearly established. *Cortez v. McCauly*, 478 F.3d 1108, 1114 (10th Cir. 2007). In order to show that the right was clearly established, a plaintiff must identify on point Supreme Court or Tenth Circuit precedent or identify "clearly established weight the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (internal quotations omitted). Additionally, in qualified immunity cases involving warrantless arrests officers are entitled to qualified immunity if there was "arguable probable cause" to make an arrest. *See Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012). "Arguable probable cause is another way of saying that the officers' conclusions

rest on an objectively reasonable, even if mistaken, belief that probable cause exists." *Stonecipher v. Valles*, 759 F.3d 1134,

The evidence in the record is clear that Plaintiff cannot establish an underlying constitutional violation by Officer Archer. But even if the Court finds a dispute of fact exists on that prong, Plaintiff cannot show the right was clearly established at the time. Plaintiff has pointed to no case law that shows that Officer Archer should not have relied on his reasonable beliefs that Plaintiff was intoxicated. Instead, he continues to rely on his unsupported version of events and claims this is an issue for the jury. This is simply not enough to overcome qualified immunity in this case, especially when the Court considers that multiple cases have found probable cause in similar circumstances and multiple other officers on the scene believed probable cause existed. *Wilder v. Turner*, 490 F.3d 810, 814 (10th Cir. 2007); *U.S. v. Chavez*, 660 F.3d 1215, 1224 (10th Cir. 2011) (collecting cases describing indicators of intoxication that can support probable cause, such as bloodshot eyes, slurred speech, and slow hand movements). Additionally, the record establishes that Officer Archer's belief that he had probable cause was objectively reasonable. He, along with other officers on the scene, observed and believed Plaintiff exhibited classic signs of intoxication. As discussed in Officer Archer's underlying brief, all signs pointed to the belief that Plaintiff was driving while intoxicated and had possession of a firearm while intoxicated. Officer Archer is entitled to qualified immunity and summary judgment.

IV. OFFICER ARCHER WAS NOT ACTING UNDER THE COLOR OF STATE LAW

Plaintiff's argument that Officer Archer acted under the color of state law is unsupported by the case law he relies upon. The case that Plaintiff claims supports his

argument addresses private vs state conduct, which is not at issue. The issue here is whether Officer Archer acted under state or tribal authority. It is undisputed that Officer Archer lacked state law enforcement authority over Plaintiff, an Indian, in Indian country.

State and tribal police work under cross-deputization agreements, meaning their actions derive from tribal, not state, authority. Courts have held that officers acting under tribal authority are not subject to § 1983 claims. *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006); *McKinney v. Oklahoma*, 925 F.2d 363, 365 (10th Cir. 1991). While there is no question that tribal and federal officers may exercise law enforcement authority over Indians in Indian country, there is no authorization for state law enforcement officers to do the same. *See Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir. 1990) ("states [lack] independent authority to enforce their own laws over Indians on Indian land."). "Indian country is subject to exclusive federal or tribal criminal jurisdiction." *Id*. at 1352 (citing 18 U.S.C. § 1152) (emphasis added). Since Plaintiff is undisputedly an Indian and the encounter occurred in Indian Country, Officer Archer acted under tribal authority, not color of *state law*. Thus, Plaintiff has not, and cannot, establish a deprivation under 42 U.S.C. § 1983.

V. THE FACTS DO NOT SUPPORT A CLAIM OF PUNITIVE DAMAGES

There is no support for the claim that Officer Archer falsely reported the facts, as the record is clear that other officers on the scene, and the video evidence, confirm the facts. Thus, there is no factual support for Plaintiff's claim that Officer Archer acted with malice.

For the reasons set forth in the Motion and further above, Officer Archer is entitled to Summary Judgment on all claims against him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd of May, 2025, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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