

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RYAN MODERSON,
ESTATE OF MICHAEL PETERSON, and
STEVEN ERATO,

Plaintiffs,

v.

Case No. 21-C-272

CITY OF NEENAH, ANGELA EICHMANN,
SHAUN O'BRE, TYRON THOMPSON,
JOHNATHAN KUFFEL, MARLYN HEITING,
STEVEN DOE, and SALLY ROE,

Defendants.

**DECISION AND ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

This lawsuit arises out of the tragic consequences that unfolded when local law enforcement officers responded to an attempt by Brian Flatoff to take hostages at a motorcycle shop in Neenah, Wisconsin. *See Mason-Funk v. City of Neenah*, 895 F.3d 504 (7th Cir. 2018). Ryan Moderson, Michael Peterson (by his estate), and Steven Erato, who were held hostage at gunpoint by Flatoff, brought this action against the City of Neenah and the responding officers, Lt. Angela Eichmann, Lt. Shaun O'Bre, Lt. Tyron Thompson, Lt. Jonathan Kuffel, and Officer Marlyn Heiting,¹ alleging that their constitutional rights were violated when the officers improperly detained and/or arrested them after Michael Funk, another hostage, was mistakenly shot and killed by police and Flatoff was taken into custody. The case is before the court on

¹ The Clerk is directed to correct the caption to reflect that Defendant Heiting's name is "Marlyn Heiting," not "Marly Heiting."

Defendants' motion for summary judgment. For the following reasons, the motion will be granted and the case dismissed.

BACKGROUND

On December 5, 2015, at 8:56 a.m., Winnebago County dispatch advised the City of Neenah Police Department that there was a weapons call at Eagle Nation, a motorcycle shop located in Neenah, Wisconsin, that a subject in that business had fired a shot, and that officers should respond to that location. Lt. O'Bre, the on-duty patrol supervisor for the City of Neenah Police Department on that day, was in the police station when he received the dispatch call and immediately responded to the scene. Lt. O'Bre was advised by radio that a man inside the building was armed with a MAC-10 weapon, that there were two or three hostages inside, and that it was an active hostage situation. Based on the information provided, Lt. O'Bre believed that there was an armed and dangerous subject inside the business who was holding innocent people against their will. Lt. O'Bre was informed by dispatch that the subject had long hair and a beard, was wearing a flannel shirt, and identified as Brian Flatoff. Dispatch did not provide any description of the hostages.

Officer Hoffer understood that there was a hostage-taker, name unknown, and several hostages at Eagle Nation whom the hostage-taker threatened to kill in five minutes. He also understood that the hostage-taker was wearing a flannel shirt and had long hair. Officer Hoffer did not know the names of any of the hostages.

Officer Ross also understood that there was a hostage-taker, there were two to three hostages, shots had been fired, and the hostage-taker had imposed a five-minute deadline. He learned further that the hostage-taker was wearing either plaid or flannel and had long hair and a possible beard. Like Officer Hoffer, Officer Ross did not know any of the hostages' names.

Upon arrival, Lt. O'Bre advised area units to set up a perimeter on the business. Lt. O'Bre advised that the perimeter should be "invisible containment" so as not to give away the officer's location or presence. As Lt. O'Bre was setting up the perimeter, Officer Heiting stated over the radio that a truck was leaving the building. Dispatch subsequently advised that the shooter was leaving in a truck, so the officers left their locations and moved to intercept the vehicle.

Sgt. Eichmann and Officer Ross stopped the vehicle and ordered the driver out of the vehicle with his hands up. The driver complied and got on the ground. The officers identified the driver as Ethan Moderson, handcuffed him, and searched him. Ethan Moderson told Officer Ross and Sgt. Eichmann that he had just left Eagle Nation and that there was a white male with long hair inside the building with a gun. He reported that his father, Ryan Moderson, was inside Eagle Nation and had motioned Ethan to get out of the building, so Ethan did. Sgt. Eichmann and Officer Ross interviewed Ethan Moderson for about one minute before releasing him.

After dispatch reported that a man with a gun was still inside Eagle Nation, Lt. O'Bre asked Sgt. Eichmann to manage the perimeter so that Lt. O'Bre could set up a "hasty team," or a patrol response team, to enter Eagle Nation from behind Gord's Bar. As Lt. O'Bre was forming the hasty team, Lt. Kuffel arrived and took the team over. Lt. Kuffel heard a statement over the radio that, if officers were not in the building in one minute, people were going to die. Lt. Thompson and Officer Hoffer then arrived on the scene. Lt. Kuffel started to stack the officers to enter Eagle Nation. Lt. Kuffel determined it was necessary to enter the building because there was a countdown and it was a rapidly evolving situation.

Once the officers entered Eagle Nation, they voiced multiple identifications and warnings including, "police," "get down," "get on the ground now," "show me your hands," "see your hands," and "get down in front now." Defs.' Proposed Findings of Fact (DPFOF) ¶ 41, Dkt. No. 61. Within a few seconds of entering the building, Lt. Thompson and Lt. O'Bre fell down the

stairs just inside the doorway. Upon entry, Lt. Kuffel noticed a large amount of mechanical-type equipment, including motorcycles and toolboxes, that limited their ingress. Lt. Kuffel also saw two individuals only from their shoulders up. Defendants contend that Lt. Kuffel believed the individuals were splitting up and moving in opposite directions as if they were trying to flank the officers. *Id.* ¶ 46. Officer Koffer observed the individuals spread out throughout the shop area and hide behind objects in the building as if in positions of cover. *Id.* ¶ 48. Plaintiffs assert that Moderson, Funk, and Peterson did not surround officers as if they were going to ambush them. Pls.’ Resp. to DPFOF ¶ 46, Dkt. No. 69.

In any event, instead of compliance with police commands from any of the individuals inside the shop, the hasty team was met with a hail of gunfire. One of the first rounds fired struck Officer Hoffer in the helmet. Shortly after the gunfire erupted, a large white cloud appeared inside the building. It was later determined that the white cloud was the result of a bullet striking a fire extinguisher. Lt. Kuffel could not identify the individual or individuals doing the shooting or how many people were shooting and felt the percussion of the rounds being fired on the right side of his face. He heard Officer Hoffer yell, “I’m hit,” and saw Officer Hoffer on his back. DPFOF ¶ 54. Lt. Kuffel noticed that Lt. O’Bre and Lt. Thompson were gone. Unable to identify the source of gunfire, Lt. Kuffel used target-specific directed fire to keep the shooter down after seeing Officer Hoffer on his back. After the hasty team was fired upon and returned fire, they disengaged and withdrew from the building.

Upon their retreat from Eagle Nation, officers again attempted verbal contact, which was met with more gunfire. At this point, Lt. Kuffel stated, “There are no . . . hostages.” *Id.* ¶ 58. The officers’ perception that everyone in the building failed to follow commands as well as the immediate and heavy volume of gunfire led Lt. Kuffel, Officer Hoffer, and Officer Ross to conclude that the officers were facing an ambush, rather than a hostage situation. Lt. O’Bre

believed that what the officers had responded to was not what it was reported to be and could have been an ambush.

Soon thereafter, Lt. Kuffel was advised that two individuals were coming out of the back door of Eagle Nation, and he set up two arrest teams to take them into custody. Lt. Kuffel took Peterson into custody, handcuffed him, walked him toward the officers' location near Gord's Bar, and turned him over to Officer Heiting. Lt. Kuffel asked Peterson who was shooting at them, and Peterson responded that it was Flatoff. A State Patrol Officer then took custody of Peterson.

Lt. Thompson, Lt. O'Bre, and Officer Goetz initially took custody of Moderson, but Moderson was turned over to Officer Heiting and placed in the rear of Officer Heiting's patrol vehicle. Officer Heiting asked Moderson if he was injured, and Moderson responded that he was not. It appeared to Officer Heiting that Moderson may have been one of the initial hostages. Moderson reported that Funk, Erato, and George were still in the building with the shooter. Moderson also reported that his son, Ethan, had been in the building and that Flatoff was holding Funk at gunpoint and stated that if anyone called the police, he would shoot everyone who was there. Moderson indicated that when Flatoff learned that others were in the building, Flatoff told Moderson and Peterson to leave the store, and Flatoff asked how to lock the door. *Id.* ¶ 94. After Officer Heiting determined that Moderson was no longer needed at the scene, he transported Moderson to the area of Wisconsin Avenue and Church Street to meet with his son, Ethan Moderson. Officer Heiting was able to speak with Ethan Moderson and obtain a statement from him as well. Ryan and Ethan Moderson agreed to be interviewed further at the Neenah Police Department. Later that day, Ryan Moderson voluntarily went to the Menasha Police Department to provide a written and signed statement.

After returning to the scene, Officer Heiting transported Peterson to the Neenah Police Department where he was turned over to the interview team. Officer Heiting then returned to the scene to act as support and provide transportation.

Three minutes after the officers retreated from Eagle Nation, another burst of gunfire came from the building. Funk left the building holding a firearm, took cover behind a vehicle, and then ran across the alley. He was tragically shot by officers who mistakenly believed Funk was the hostage-taker. *See Mason-Funk*, 895 F.3d at 505. Shortly thereafter, Flatoff was arrested, and the final hostage, Erato, exited the building.

Erato, who was initially in the custody of a Winnebago County Emergency Response Team Member, was turned over to Officer Heiting and placed in the rear of his patrol vehicle. Officer Heiting took Erato's wallet, cell phone, vehicle key, and rosary and transported Erato to the Neenah Police Department. Due to space constraints, Erato was taken to the booking room in an interview room before he was interviewed by Wisconsin Department of Criminal Investigation Investigator Waterstreet. Special Agent Waterstreet made contact with Erato, who was accompanied by his attorney. Erato's attorney agreed to allow Erato to speak with the special agents and remained present during the interview. The special agents informed Erato that he was not under arrest, that he was free to leave at any time, and that he was not required to answer any questions. Erato stated that he understood and agreed to speak with the special agents under the advice of his attorney.

LEGAL STANDARD

Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the court must view the evidence and make all reasonable inferences in the light most favorable to the non-moving party. *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 893 (7th Cir. 2018) (citing *Parker v. Four*

Seasons Hotels, Ltd., 845 F.3d 807, 812 (7th Cir. 2017)). The party opposing the motion for summary judgment must “submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial.” *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (citations omitted). “The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts.” *Id.* Summary judgment is properly entered against a party “who fails to make a showing to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.” *Austin v. Walgreen Co.*, 885 F.3d 1085, 1087–88 (7th Cir. 2018) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

ANALYSIS

Plaintiffs claim that the Defendant Officers unreasonably seized, detained, and arrested them in violation of the Fourth Amendment. As an initial matter, Defendants assert that the City of Neenah must be dismissed because Plaintiffs have not stated a cognizable claim against the City. Plaintiffs concede that there is no basis for a claim against the City of Neenah. Therefore, the City will be dismissed. In addition, Plaintiffs listed “Steven Doe” and “Sally Roe” as defendants in this action. To date, Plaintiffs have not filed an amended complaint that provides the names of the Doe defendants. Because Plaintiffs have not identified the Doe defendants in a timely manner, their claims against the Doe defendants will be dismissed. The court now turns to Plaintiffs’ claims.

A. Fourth Amendment Claim

The Fourth Amendment guarantees the right of persons to be free from “unreasonable searches and seizures” by the government. U.S. Const. amend. IV. The “general rule” is that “Fourth Amendment seizures are ‘reasonable’ only if based on probable cause to believe that the individual has committed a crime.” *Bailey v. United States*, 568 U.S. 186, 192 (2013) (citing *Dunaway v. New York*, 442 U.S. 200, 213 (1979)) (internal quotation marks omitted). Within the

framework of this fundamental rule, however, is “some latitude for police to detain where the intrusion on the citizen’s privacy was so much less severe than that involved in a traditional arrest that the opposing interests in crime prevention and detection and in the police officer’s safety could support the seizure as reasonable.” *Id.* at 193 (internal quotation marks and citations omitted). In assessing reasonableness, courts “first consider whether the detention was justified from the outset and then ask ‘whether it was reasonably related in scope to the circumstances which justified the interference in the first place.’” *Matz v. Klotka*, 769 F.3d 517, 524 (7th Cir. 2014) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The court’s inquiry is limited to what the officers knew at the time of the seizure, not what has been gained from hindsight. *See Harney v. City of Chicago*, 702 F.3d 916, 922 (7th Cir. 2012) (citation omitted).

Plaintiffs argue that it was unreasonable for the officers to detain them because the officers were repeatedly informed that there was only one gunman who had taken the occupants of Eagle Nation hostage. They assert that because there was no reason for officers to believe this information was untrue, the officers had no probable cause that Plaintiffs had committed a crime. But “[r]estraining an individual may be appropriate in ‘inherently dangerous situations,’ even if the officers do not suspect the restrained individual of a crime.” *Estate of Biegert v. Molitor*, 968 F.3d 693, 699 (7th Cir. 2020) (citing *Muehler v. Mena*, 544 U.S. 93, 100 (2005)). Indeed, “it may be reasonable for police to detain people not suspected of criminal activity themselves, so long as the additional intrusion on individual liberty is marginal and is outweighed by the governmental interest in conducting legitimate police activities safely and free from interference.” *United States v. Howard*, 729 F.3d 655, 659 (7th Cir. 2013) (collecting cases).

In this case, the dangerousness of the situation the officers faced was obvious. Officers received reports that a hostage-taker had threatened to kill his hostages and that shots had been fired in Eagle Nation. When the hasty team entered Eagle Nation, the officers were met with a

barrage of gunfire, which led them to believe that they were being ambushed. A white cloud, later determined to be the result of a bullet striking a fire extinguisher, prevented the officers from identifying who was shooting at them and how many shooters there were. Shortly after the officers' retreat from Eagle Nation, the officers attempted verbal contact and were met with more gunfire. An unidentified man, now known to be Funk, ran out of the building with an unholstered gun in his hand, creating confusion as to whether the hostage-taker had an accomplice. The threat to public safety was serious.

Even though the caller had identified Flatoff as the sole hostage-taker inside Eagle Nation, the officers were not required to bet their lives on the caller's report being 100% true. The officers had a general description of the hostage-taker, but they did not know how many hostages there were, the names of the hostages, or what they looked like. The officers also had reason to believe there was at least one gun on the scene, but they did not know who had firearms or how many they had. Having been met with a fusillade of bullets upon entering the shop and given what they took to be a number of occupants ignoring their instructions, the officers were justified in taking steps to verify who was a suspect and who was a hostage before simply turning everyone loose.

Against the background of the ongoing threat and the rapidly evolving situation, it was reasonable for the officers to conclude that it was necessary to detain Plaintiffs and briefly put them in handcuffs to confirm the individuals' identities and be able to safely investigate without interference. Moderson and Peterson exited the building and were taken into custody while the hostage situation was ongoing. After Moderson was placed in the rear of Officer Heiting's patrol vehicle, Moderson provided information about who was in Eagle Nation and what had occurred. Officer Heiting determined that Moderson was a hostage and no longer needed at the scene and transported Moderson to an area to meet with his son. Later that day, Moderson voluntarily went to the Menasha Police Department to provide a written and signed statement. Peterson advised

that Flatoff was the one shooting at officers, and he was ultimately transported to the Neenah Police Department where he was turned over to the interview team. Erato was the final hostage to exit Eagle Nation after Flatoff was arrested. Erato was turned over to Officer Heiting and placed in the rear of his patrol vehicle. Officer Heiting took Erato's wallet, cell phone, vehicle key, and rosary, and transported him to the Neenah Police Department. After being advised that he was not under arrest, that he was free to leave at any time, and that he was not required to answer any questions, Erato agreed to speak with Wisconsin Department of Criminal Investigation agents, consistent with his attorney's advice. Under these circumstances, Plaintiffs' detention was reasonable and no Fourth Amendment violation occurred.

Defendants also assert that Lt. Eichmann must be dismissed because she had no direct involvement in detaining Plaintiffs. For an individual to be liable under 42 U.S.C. § 1983, she must have directly participated in the constitutional violation. *Palmer v. Marion*, 327 F.3d 588, 594 (7th Cir. 2003). Plaintiffs concede that Lt. Eichmann did not have any contact with Ryan Moderson, Michael Peterson, or Steven Erato, either as hostages or witnesses. Although Plaintiffs argue that Lt. Eichmann was "in charge of the operation," Pl.'s Br. at 37, Dkt. No. 69, they have not demonstrated that Lt. Eichmann was personally responsible for the decision to detain Plaintiffs or knew about any alleged misconduct and chose to ignore, condone, approve, or facilitate it. Therefore, Lt. Eichmann will be dismissed as a defendant.

B. Qualified Immunity

Defendants argue, in the alternative, that they are entitled to qualified immunity. Under the doctrine of qualified immunity, government officials performing discretionary functions are immune from civil liability for constitutional violations "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). "Qualified immunity attaches when an official's conduct

does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (citation omitted). Even though qualified immunity is a defense to a § 1983 action, the plaintiff has the burden of overcoming the defense. *Spiegel v. Cortese*, 196 F.3d 717, 723 (7th Cir. 1999). The plaintiff must show the deprivation of a constitutional or statutory right and the right must be clearly established at the time of the defendants’ conduct. *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001). The Supreme Court has repeatedly cautioned courts “not to define clearly established law at a high level of generality.” *City & Cty. of San Francisco v. Sheehan*, 575 U.S. 600, 611 & n.3 (2015) (quotation marks omitted). It has instructed:

An officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent placed the statutory or constitutional question beyond debate. This exacting standard gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.

Id. (internal quotation marks and citation omitted). In other words, the court must determine whether a constitutional rule applies with such obvious clarity that it placed the officers in this case on notice that their conduct was unlawful.

Plaintiffs assert that the “right to be free from arrest without probable cause has been clearly established.” Pl.’s Br. at 29. But Plaintiffs have not identified, and the court has not found, a controlling case or robust collection of persuasive authority analogous to the instant set of facts that clearly establishes that Defendants’ conduct violated Plaintiffs’ constitutional rights. As a result, Defendants are entitled to qualified immunity. For this reason as well, Defendants’ motion for summary judgment is granted.

CONCLUSION

For these reasons, Defendants' motion for summary judgment (Dkt. No. 59) is **GRANTED**. The case is dismissed. The Clerk is directed to enter judgment accordingly.

SO ORDERED at Green Bay, Wisconsin this 5th day of September, 2023.

s/ William C. Griesbach

William C. Griesbach
United States District Judge