No. 12-1674

United States Court of Appeals

For the Seventh Circuit

SHAUN J. MATZ (State Prisoner: #264654)
Plaintiff-Appellant,

v.

RODNEY KLOTKA, et al.
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 2:08-cv-00494-RTR
Honorable Rudolph T. Randa, Presiding Judge

BRIEF FOR PLAINTIFF-APPELLANT SHAUN J. MATZ

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Oral Argument Requested

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-1674

Short Caption: Shaun J. Matz v. Rodney Klotka, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Shaun J. Matz

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Brian J. Murray Date: 3/12/13

Attorney's Printed Name: Brian J. Murray

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Marron A. Mahoney Date: 3/12/13

Attorney's Printed Name: Marron A. Mahoney

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES
(continued)

Cases **Page(s)**

TABLE OF AUTHORITIES
(continued)

Cases **Page(s)**

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Shaun J. Matz brought this action against Defendants-Appellees Rodney Klotka, Karl Zuberbier, Shannon Jones, Percy Moore, Mark Walton, and Michael Caballero (collectively "Defendants") under 42 U.S.C. § 1983. Accordingly, the district court had jurisdiction over Matz's claims pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). The district court granted Defendants' Motion for Summary Judgment on all of Matz's claims (R.94), and entered final judgment in favor of Defendants on March 8, 2012 (R.95). This Court has jurisdiction over the final judgment of the district court pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

As requested by this Court in its December 11, 2012 Order, Matz presents the following issues for resolution on appeal:

1. Whether Defendants had reasonable suspicion to conduct an investigative stop of Matz under *Terry v. Ohio*, 392 U.S. 1 (1968);

2. Whether Defendants had probable cause when they arrested Matz;

3. Whether Milwaukee County's practice of allowing court commissioners to make probable cause determinations based on arrest and detention reports is consistent with the requirement of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), that custodial arrestees receive a judicial determination of probable cause within 48 hours of arrest; and

4. Whether Defendants violated Matz's Fifth Amendment rights by interrogating him after he invoked his right to remain silent.

INTRODUCTION

The rights to be free from unlawful detention and arrest, to have a prompt probable cause determination, to remain silent, and to have an attorney present for questioning are among the most fundamental protections enshrined in our Constitution. All citizens—no matter who they are, where they are from, or what they have done—are entitled to these intrinsic rights. Defendants, then all officers in the Milwaukee Police Department, violated these rights of Plaintiff-Appellant Shaun Matz on September 16, 2003, when they stopped and arrested him without reasonable suspicion or probable cause simply because he was at the wrong place at the wrong time.

That evening, Matz was standing on a front porch with friends. He saw two police officers drive past the house and start to make a U-turn. Not wanting to speak to the officers—which Matz was under no obligation to do—he decided to leave. This innocuous and legal act ultimately led to his arrest and hours-long interrogation, during which Defendants ignored Matz's Fifth Amendment rights and failed to afford him the constitutionally required probable cause determination.

At summary judgment, Matz came forward with sufficient evidence to present his Fourth and Fifth Amendment claims to a jury. But the district court denied him that opportunity. In entering judgment in favor of Defendants as a matter of law, the district court both improperly substituted its judgment for that of the jury and made legal errors, requiring reversal on appeal.

First, based on the evidence before the district court, a reasonable jury could conclude that Defendants both lacked reasonable suspicion for the *Terry* stop and probable cause for Matz's arrest, thereby violating Matz's Fourth Amendment rights. Second, the district court legally erred in finding Matz received a probable cause determination that comported with *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Because the Milwaukee County policy of allowing a court commissioner to base a probable cause determination on unsworn statements in an arrest report violates constitutional requirements, this was error. Finally, the district court incorrectly concluded that *Heck v. Humphrey*, 512 U.S. 477 (1994), barred Matz's Fifth Amendment claim. Matz's Fifth Amendment claim would not necessarily invalidate Matz's conviction or sentence, and Matz accordingly should have an opportunity to present this claim to a jury. For any or all of these reasons, the district court's judgment should be reversed.

STATEMENT OF THE CASE

On June 6, 2008, Matz filed this suit in the U.S. District Court for the Eastern District of Wisconsin against Defendants Klotka and Zuberbier under 42 U.S.C. § 1983. (R.1.)[1] The district court dismissed the action *sua sponte* on screening, *see* 28 U.S.C. § 1915A(a), finding that Matz's claims were barred under *Heck*, 512 U.S. 477. (R.5.) This Court summarily reversed. (R.18.) On May 10, 2010, the district court appointed Matz counsel. (R.47.) Appointed counsel filed a Second Amended Complaint against Defendants Klotka,

[1] Record materials are cited by docket number as (R.__.). Appellant's appendix materials are cited as (A.__.).

Zuberbier, Jones, Moore, Walton, and Caballero. (R.52.) The Second Amended Complaint alleged Defendants violated Matz's Fourth and Fifth Amendment rights. On July 8, 2011, Defendants moved for summary judgment on all of Matz's claims. (R.70.) The district court granted their motion on March 8, 2012. (R.94.) The court then entered final judgment. (R.95.)

STATEMENT OF FACTS

A. The Police Arrest Matz Who Was in the Wrong Place at the Wrong Time.

In the evening, on September 16, 2003, around 5 to 6 p.m., Plaintiff-Appellant Shaun Matz, Javier Salazar, and other individuals stood on the front porch of a house at 1335 S. Layton Blvd. in Milwaukee, Wisconsin. (R.86 ¶ 3; R.93 ¶¶ 1, 5.) The parties dispute whether this home was located in a high-crime neighborhood. (R.71 at 11-12; R.93 ¶ 4.)

Defendants Karl Zuberbier and Rodney Klotka, then both Milwaukee Police Officers assigned to the warrant squad, were in uniform and driving in an unmarked police vehicle. (R. 84 ¶¶ 2-3, 5.) They turned onto Layton Blvd. (*Id.* ¶ 8.) As they drove past 1335 S. Layton Blvd., Zuberbier thought he saw Javier Salazar on the front porch. (*Id.* ¶¶ 9, 11.) Zuberbier was familiar with Salazar from a warrant squad briefing. (*Id.* ¶ 10.) He believed that Salazar was wanted for an armed robbery and was a member of the Latin Kings gang. (*Id.* ¶¶ 9-11.) Zuberbier told Klotka that Salazar might be on the porch. (*Id.* ¶ 15.) Klotka then made a U-turn in a break in the boulevard some distance down the street from the house. (*Id.* ¶ 17.) Seeing this, the individuals on the front porch, including Matz, began to depart. (*Id.* ¶ 18.) By the time the officers'

vehicle stopped by the house, everyone had left the porch. (*Id.* ¶¶ 18-19.) Matz did not run from the porch area, and neither Klotka nor Zuberbier recalls seeing Matz on the porch. (R.93 ¶¶ 19, 55.)

Zuberbier exited the vehicle and ran along the south side of the house; Klotka ran south for a short distance, then headed west. (R.84 ¶¶ 22-23.) Klotka ran along the south side of the porch between two houses, to the back of the residence. (*Id.* ¶ 24.) As Zuberbier was running down the alley, he saw three people—two males and a female—just starting to run southbound in the alley, and two more people in a car. (*Id.* ¶ 25.) Matz was the driver. (*Id.* ¶ 35.) As Matz drove down the alley, Zuberbier pointed his gun at Matz. He threatened to blow Matz's "fucking head off" unless he stopped. (*Id.* ¶ 30; R.86 ¶ 16.) Matz immediately stopped the car. (R.93 ¶ 26.) Klotka ordered him out of the vehicle at gunpoint and placed him in handcuffs. (R.84 ¶ 30; R.86 ¶ 19.) When Klotka and Zuberbier first stopped Matz, they did not know who he was or whether he had committed any crime. (R.93 ¶¶ 12, 56.) Klotka then searched Matz while Zuberbier searched the car. (*Id.* ¶¶ 27-28.) At this point, Klotka and Zuberbier did not know that the vehicle was stolen, but this fact was later discovered before Matz was taken to the police station. (R.84 ¶¶ 38-39.)

B. Despite Repeatedly Asking for a Lawyer and Invoking His Right to Remain Silent, Matz Is Interrogated Until He Gives a Statement

Eventually, Matz was placed in a paddy wagon, where Defendant Michael Caballero, then a detective in the homicide unit of the Milwaukee Police

Department, questioned him about two homicides. (*Id.* ¶ 50; R.93 ¶¶ 31, 34.) Matz replied that he did not want to talk, and wanted an attorney. (R.93 ¶ 34.) Despite this invocation of his rights, Caballero continued to interrogate Matz. (*Id.*)

They eventually arrived at the police station, where Matz was processed. The next day, September 17, 2003, at 6:20 a.m., Defendants Shannon Jones and Percy Moore, also detectives in the homicide division of the Milwaukee Police Department, began interrogating Matz. (*Id.* ¶ 36; R.84 ¶¶ 45, 48.) Again, Matz told them at the outset that he did not want to talk to them, or to anyone else, about any homicides or shootings. (R.93 ¶ 40.) He just wanted to go back to his cell. (*Id.*) Jones and Moore, however, continued to question Matz and tried to get him to talk. (*Id.* ¶¶ 42-43.) At one point during the interrogation, Moore told Matz that it would go easier for him if he just cooperated and told them what happened. (*Id.* ¶ 43.) Jones and Moore questioned Matz for four hours before he was returned to his cell. (*Id.* ¶ 45.)

Hours passed. Then, around 8:52 p.m., Matz was once again removed from his cell for interrogation, this time by Caballero and Mark Walton, another detective in the Milwaukee Police Department. (*Id.* ¶ 45; R.84 ¶ 52.) Both Caballero and Walton knew that Matz previously had invoked his right to remain silent. (R.93 ¶ 74.) Once again, Matz said that he did not want to talk. (*Id.* ¶ 46.) But Walton and Caballero continued to question Matz about two homicides. This time, the interrogation proceeded for six hours into the early hours of the morning. (*Id.* ¶¶ 45, 49.) Although Walton acknowledged that

Matz had certain rights, he told Matz that Matz would give them a statement regardless of those rights. (*Id.* ¶ 47.) During this interview, Matz was sitting in a defeated position. (*Id.* at ¶ 75.) Ultimately, after being questioned despite invoking his right to remain silent, Matz provided a statement to Walton and Caballero about his involvement in two homicides. (*Id.* ¶ 48.) Matz maintains that the statement was not true, and that he only made the statement because he believed Walton and Caballero would not return him to his cell unless he talked. (*Id.*) Only after Walton and Caballero completed this last interrogation of Matz at 2:50 a.m.—six hours after that interrogation started—was Matz returned to his cell. (*Id.* ¶ 49.) Seven days after his arrest, Matz was finally presented to a commissioner for his initial appearance, where a probable cause determination was made. (*Id.* ¶ 50.)

Matz later disavowed the inculpatory statement he made to Walton and Caballero (*id.* ¶ 77), and pled guilty to one count of first-degree reckless homicide and one count of felony murder with armed robbery as the underlying crime (R.84 ¶ 1). He currently is serving his sentence at the Columbia Correctional Institution. (*Id.*)

C. Proceedings & Disposition Below

On June 6, 2008, Matz filed this suit in the U.S. District Court for the Eastern District of Wisconsin against Klotka and Zuberbier. The complaint asserted claims under 42 U.S.C. § 1983. Specifically, Matz alleged that Klotka and Zuberbier violated his Fourth Amendment right to be free from unlawful

seizures without probable cause and his Fourteenth Amendment right to receive a prompt probable cause determination. (R.1.)

The district court dismissed the action *sua sponte* on screening, *see* 28 U.S.C. § 1915A(a), finding that Matz's claims were barred under *Heck v. Humphrey*, 512 U.S. 477 (1994). (R.5.) This Court summarily reversed, holding that *Heck* did not bar Matz's claims. (R.18.)

On May 10, 2010, the district court appointed Matz counsel. (R.47.) Appointed counsel filed a Second Amended Complaint against Klotka, Zuberbier, Jones, Moore, Walton, and Caballero. (R.52.) In the Second Amended Complaint, Matz alleged that Klotka and Zuberbier violated his Fourth Amendment right to be free from unlawful seizure and arrest without the requisite reasonable suspicion or probable cause. (*Id.*) He also alleged that Jones, Moore, Walton, and Caballero (collectively "Defendant Detectives"), violated his Fourth Amendment rights by detaining him without a probable cause hearing within forty-eight hours of his warrantless arrest. He further alleged that the Defendant Detectives violated his Fifth Amendment rights to remain silent and to counsel. (*Id.*)[2]

On July 8, 2011, Defendants moved for summary judgment on all of Matz's claims. (R.70.) The district court granted their motion in its entirety on March 18, 2012 (R.94), and entered final judgment in favor of Defendants (R.95).

[2] The Second Amended Complaint also included claims against the City of Milwaukee, which the district court dismissed on July 20, 2010. (R.53.)

First, the district court found that Klotka and Zuberbier had reasonable suspicion to conduct a *Terry* stop because Matz's "behavior as a whole suggested that he may have been involved in criminal activity." (A.11.) In making this finding, however, the district court ignored a disputed question of fact as to the level of gang activity in the neighborhood, weighed evidence, and drew reasonable inferences against Matz.

Second, the district court concluded that Klotka and Zuberbier had probable cause to arrest Matz because "a great amount of time could not have elapsed between the stop and the discovery that the vehicle was stolen," (A.13), which was the only probable cause Defendants have identified to support the arrest. In reaching this conclusion, however, the district court never identified when the *Terry* stop actually transformed into an arrest. And a reasonable jury could conclude that the arrest occurred before Klotka and Zuberbier learned the vehicle was stolen—and before they had probable cause.

Third, the district court found that the Defendant Detectives did not violate Matz's Fourth Amendment rights by detaining him without a prompt probable cause determination. Specifically, the court relied on a Milwaukee County commissioner's signature on Matz's arrest report as evidence that a probable cause determination was made within forty-eight hours of Matz's arrest. (A.15.) That report included both unsworn officer statements and statements Matz maintains were obtained in violation of his Fifth Amendment right to remain silent.

Finally, the district court rejected Matz's Fifth Amendment claim as barred by *Heck*, 512 U.S. 477. According to the district court, Matz's "sentence was based, at least in part" on the inculpatory statement underlying Matz's Fifth Amendment claim "and his later disavowal of it." (A.17.) "Without that statement," the district court found, "the sentence (or at least the reasoning underlying it) would have been different." (*Id.*)

Matz timely filed his notice of appeal on March 21, 2012. (R.97.) After the parties filed their initial briefs, this Court appointed the undersigned counsel on December 12, 2012.

SUMMARY OF ARGUMENT

The district court's order entering summary judgment in favor of Defendants on Matz's Fourth and Fifth Amendment claims should be reversed.

First, with respect to Matz's Fourth Amendment unlawful *Terry* stop claim, the district court erred in ignoring genuine disputes of material fact and drawing inferences in favor of moving parties Klotka and Zuberbier. Specifically, in assessing whether the officers had reasonable suspicion to stop Matz in light of the totality of the circumstances, the district court failed to consider Matz's evidence that 1335 S. Layton Blvd. was not located in an area known for gang activity. The evidence on which the district court did rely—namely, Salazar's presence at 1335 S. Layton Blvd. and the group's "flight" from the porch—does not establish reasonable suspicion as a matter of law.

Second, with respect to Matz's Fourth Amendment claim for unlawful arrest, the district court never identified when the *Terry* stop transformed into

an arrest. Because the facts support the reasonable conclusion that the arrest occurred *before* Klotka and Zuberbier learned the vehicle was stolen–which was the only basis for probable cause—the court erred in finding that the arrest comported with the Fourth Amendment as a matter of law.

Third, the district court erred in finding that Matz's arrest report demonstrated that Matz received a probable cause determination within forty-eight hours of his arrest as required by *Riverside*, 500 U.S. 44. That report, which includes both unsworn statements by police officers and statements by Matz allegedly obtained in violation of his Fifth Amendment rights, is constitutionally insufficient to support a probable cause determination.

Finally, the district court erred in holding that Matz's Fifth Amendment claim was barred by *Heck*, 512 U.S. 477. Because the confession at issue in Matz's Fifth Amendment claim does not necessarily implicate the validity of his conviction or sentence, *Heck* is not a bar. In addition, Matz presented sufficient evidence from which a jury could reasonably conclude that the Defendant Detectives violated his Fifth Amendment rights by continuing to question him after he invoked this right to remain silent.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, drawing all reasonable inferences in favor of the non-movant. *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1012 (7th Cir. 2006). Summary judgment should be granted only if no reasonable jury could return a verdict for the non-movant. *Id.*

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT KLOTKA AND ZUBERBIER HAD REASONABLE SUSPICION TO STOP MATZ AS A MATTER OF LAW.

A jury reasonably could find that Klotka and Zuberbier lacked reasonable suspicion to stop Matz. As explained below, Matz presented evidence that 1335 S. Layton Blvd. was not in an area known for gang activity, and at the time of the stop, the officers had no particularized suspicion linking Matz to criminal activity. Moreover, the only evidence supporting reasonable suspicion in this case—specifically, Salazar's presence and the "flight" of the group from the porch—does not establish reasonable suspicion as a matter of law. Consequently, whether the totality of the circumstances supports a finding of reasonable suspicion presents a question of fact for the jury. *See Maxwell v. City of Indianapolis*, 998 F.2d 431, 434 (7th Cir. 1993) ("[I]f the question of probable cause arises in a damages suit, it is a proper issue for the jury if there is room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them."), *cited by Sornberger*, 434 F.3d at 1013-14. The district court, therefore, erred in entering judgment in favor of Defendants on Matz's Fourth Amendment *Terry* stop claim.

A. A Jury, Viewing the Evidence in the Light Most Favorable to Matz, Could Find that Klotka and Zuberbier Lacked Any Particularized Suspicion Linking Matz to Criminal Activity.

Based on the evidence in the record, a jury could find that Klotka and Zuberbier lacked any particularized suspicion linking Matz to criminal activity

such that they conducted the *Terry* stop without reasonable suspicion in violation of Matz's Fourth Amendment rights.

To conduct a brief, investigatory stop consistent with the Fourth Amendment, an officer must have "reasonable articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). Reasonable suspicion requires that the officer "be able to articulate more than an 'inchoate and unparticularized suspicion or hunch' of criminal activity." *Id.* at 123-24 (quoting *Terry*, 392 U.S. at 27). The inquiry must take into account "the totality of the circumstances known to the officers at the time of the seizure." *United States v. Bady*, No. 12-3003, 2013 U.S. App. LEXIS 2922, at *8 (7th Cir. Feb. 12, 2013).

This Court's decision in *United States v. Bohman*, 683 F.3d 862 (7th Cir. 2012), is instructive. In *Bohman*, a source told an officer that he had seen a known meth cook brewing meth at a cabin. The source identified the parcel of land, said he had seen an anhydrous ammonia tank at the cabin within approximately the last week, and noted that the meth cook drove a green Mercury Grand Marquis. *Id.* at 862-63. While the officer was performing surveillance on the identified cabin, he observed a vehicle emerge out of the driveway. *Id.* at 863. The officer "flipped on his police lights and pulled in front of the approaching car, which stopped immediately." *Id.* The car was not a green Grand Marquis, and the officer never testified that he thought the vehicle was a Grand Marquis.

In concluding that the officer lacked the requisite reasonable suspicion to stop the car, this Court recognized that merely having reasonable suspicion of illegal activity at a property—in contrast to a warrant based on probable cause—necessarily confines an officer's ability to investigate: "[A]n officer with a warrant to search a place may stop anyone leaving that place without additional individualized suspicion, but a mere suspicion of illegal activity about a place, without more, is not enough to justify stopping everyone emerging from that property." *Id.* at 864 (citations omitted). Nor is "[a] mere suspicion of illegal activity at a particular place" sufficient "to transfer that suspicion to anyone who leaves that property." *Id.* In *Bohman*, because the officer's stop was only "based on a hunch," this Court concluded that it violated the Fourth Amendment. *Id.* at 866.

Here, similar to *Bohman*, the investigatory stop was based on nothing more than "generalized suspicions" as to Matz's involvement in criminal activity. *See id.* at 866 n.1. Defendants had no warrant for 1335 S. Layton Blvd., nor did they have any suspicion of specific criminal activity at that address. The only suspicion they arguably possessed was linked to Salazar.[3] But simply being in the company of others suspected of criminal activity "does not alone give rise to a *Terry* stop and frisk justification because the probable cause determination must be 'particularized with respect to that person.'" *United States v. Wheeler*, 800 F.2d 100, 103 (7th Cir. 1986) (quoting *Ybarra v.*

[3] With respect to Salazar, Defendants do not dispute that they did not have a warrant for his arrest. (R.93 ¶¶ 63, 70.) Nor do they dispute that the temporary felony want for Salazar was no longer in effect on September 16, 2003. (*Id.* ¶ 66.)

Illinois, 444 U.S. 85, 91 (1979)), *overruled on other grounds by United States v. Sblendorio*, 830 F.2d 1382 (7th Cir. 1987); *see also Ybarra*, 444 U.S. at 91 ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.").

At the time of the stop, Defendants had no particularized suspicion linking Matz to criminal activity. Defendants did not present any evidence that Klotka or Zuberbier saw Matz either standing on the porch, leaving the porch, or entering the car. (R.84 ¶ 25; R.93 ¶ 55.) Rather, Matz was already in the car when Zuberbier first saw it. (R.84 ¶ 25.) Klotka and Zuberbier also conceded they did not see Salazar in the car; nor did Defendants contend that anyone else in the car was committing a crime. (R.93 ¶ 24.) Thus, when they stopped Matz, the only information Klotka and Zuberbier had about him was that he was in a car driving away from 1335 S. Layton Blvd. Here, similar to *Bohman*, Klotka and Zuberbier simply stopped a car they knew nothing about other than its emergence from a home where they believed they saw a suspected felon. A jury, therefore, reasonably could find that the officers lacked reasonable suspicion to stop Matz.

B. The District Court Erred in Ignoring Disputed Questions of Fact and Drawing Inferences in Favor of Defendants.

The district court, however, concluded that Klotka and Zuberbier established reasonable suspicion as a matter of law to stop Matz. This was error for at least two reasons. First, the court ignored a disputed question of fact as to the character of the neighborhood in performing the *Terry* analysis.

Second, the court improperly found that the combination of Salazar's presence and the group's alleged flight from the porch established reasonable suspicion as a matter of law.

1. The District Court Ignored Disputed Facts and Failed to View the Totality of the Circumstances in Favor of Matz.

First, the district court's analysis failed to consider the full totality of the circumstances of the investigatory stop. *Bady*, 2013 U.S. App. LEXIS 2922, at *8 (explaining that the *Terry* inquiry must take into account "the totality of the circumstances known to the officers at the time of the seizure."). Specifically, the court ignored a material and disputed question of fact regarding the crime-level surrounding 1335 S. Layton Blvd. At summary judgment, Defendants argued that the high-crime nature of the neighborhood supported Klotka and Zurberbier's reasonable suspicion for the stop. (R.71 at 11-12.) Defendants conceded that they had no actual testimony supporting the level of crime in this particular neighborhood. Instead, they effectively asked the district court to take judicial notice of this purported "fact" based on two, unrelated court opinions which refer only generally to the Latin King gang's presence in the "south side of Milwaukee." (*See id.* at 12.)

Notably, the first opinion cited by Defendants, *United States v. Mendez*, No. 98-CR-104, 2007 WL 128340, at *2 (E.D. Wis. Jan. 11, 2007), references the Latin Kings in the "south side of Milwaukee" between 1993 and 1997—several years before the incident at issue. The second opinion simply notes that "[t]he Milwaukee Chapter [of the Latin Kings] began operations in the mid-1980s and eventually grew large enough to control a large territory on

Milwaukee's south side." *United States v. Olson*, 450 F.3d 655, 662 (7th Cir. 2006). Such generalized observations, however, are not evidence that 1335 S. Layton Blvd. was in "an area of the city in which serious gang-related activity was ongoing," as Defendants represented to the district court. (R.71 at 12.) To the contrary, Matz disputed this purported "fact," attesting that the "area surrounding 1335 S. Layton Blvd. was not a high crime area and was not known for gang activity." (R.93 ¶ 4; R.86 ¶ 4.)

The district court should have viewed this disputed fact in favor of Matz to properly assess whether the *Terry* stop was justified in light of the totality of the circumstances. Indeed, if, as Matz contends, the area was not known for gang activity, that fact necessarily impacts the reasonable officer's calculus, including the likelihood that Matz was involved in criminal activity or posed a risk of harm to the officers. *See Wardlow*, 528 U.S. at 124 ("[W]e have previously noted the fact that the stop occurred in a 'high crime area' among the relevant contextual considerations in a *Terry* analysis."). The level of crime in the neighborhood should not be emphasized when it benefits the officers but be overlooked when it demonstrates that they overstepped their constitutional authority and violated a plaintiff's Fourth Amendment rights. Thus, because there is a genuine issue of material fact which necessarily impacts the *Terry* analysis, Klotka and Zuberbier could not establish reasonable suspicion as a matter of law.

2. The Evidence the District Court Did Consider Does Not Establish Reasonable Suspicion as a Matter of Law.

Second, the evidence the district court did rely on is insufficient to establish reasonable suspicion as a matter of law. Specifically, the court primarily emphasized the combination of Salazar's presence on the porch and the group's alleged flight after seeing Klotka and Zuberbier make the U-turn as support for the stop. (A.11.) Neither fact, however, is sufficient alone to demonstrate reasonable suspicion. Merely being in the proximity of someone suspected of criminal activity does not establish reasonable suspicion. *See Wheeler*, 800 F.2d at 103. And flight from officers, although a relevant factor in the analysis, similarly has not been enough, by itself, to justify a *Terry* stop. *See Wardlow*, 528 U.S. at 124 (finding flight plus "presence in an area of heavy narcotics trafficking" established reasonable suspicion); *Bady*, 2013 U.S. App. LEXIS 2922, at *8 ("Neither . . . presence in a high-crime area nor . . . flight from police, standing alone, can provide the basis for reasonable suspicion of criminal activity.").

In fact, *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality op.), recognized that individuals approached by police officers have the right to decline to answer an officer's questions and simply can "go on [their] way." Exercising that right to refuse to stay and answer an officer's questions, therefore, cannot be the basis for reasonable suspicion. *Id.* at 498 (plurality op.) ("He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.").

In this case, any flight by those on the porch was not in response to Klotka and Zuberbier identifying themselves as police officers. *Cf. Bady*, 2013 U.S. App. LEXIS 2922, at *3, 8 (finding that attempt to evade officers and pull vehicle around officers' car after they had activated their emergency headlights supported reasonable suspicion for stop). Indeed, Klotka and Zuberbier admit that by the time their unmarked vehicle stopped at the house, everyone had already left the porch. (R.84 ¶ 19.) Based on these facts, the district court improperly drew reasonable inferences against Matz in concluding that this conduct supported the finding that those on the porch were engaged in criminal activity as opposed to merely exercising their right to avoid contact with the police.

Whether the facts of Salazar's presence and the alleged flight from the porch, in combination, demonstrate reasonable suspicion for the stop or instead support nothing more than an unparticularized hunch of criminal activity presents a question of fact for the jury. *See Maxwell*, 998 F.2d at 434 ("[I]f the question of probable cause arises in a damages suit, it is a proper issue for the jury if there is room for a difference of opinion concerning the facts or the reasonable interferences to be drawn from them."), *cited by Sornberger*, 434 F.3d at 1013-14.

For these reasons, the district court erred in entering judgment in favor of Defendants on Matz's Fourth Amendment *Terry* stop claim.

C. Qualified Immunity Does Not Protect Klotka and Zuberbier.

The district court never reached the issue of qualified immunity, but it does not protect Klotka and Zuberier in this case.[4] The qualified immunity analysis involves two separate inquiries: (1) whether the officers violated Matz's constitutional rights; and (2) whether the rights they allegedly violated were clearly established at the time the incident occurred. *Jones v. Clark*, 630 F.3d 677, 682 (7th Cir. 2011). As this Court recognized in *Jones*, "[I]t [is] well known . . . that an officer's decision to perform an investigatory stop must be justified by reasonable suspicion . . . ." *Id.* As a result, "the only question" for purposes of qualified immunity "is whether, under [Matz's] version of the facts, the defendant officers violated these clearly established rights." *Id.* For the reasons explained above, under Matz's version of the facts, a jury could conclude that Klotka and Zuberbier stopped Matz without the requisite reasonable suspicion. Consequently, qualified immunity does not apply. The district court, therefore, erred in entering judgment in favor of Defendants on this claim.

II. THE DISTRICT COURT ERRED IN FINDING THAT KLOTKA AND ZUBERBIER HAD PROBABLE CAUSE TO ARREST MATZ AS A MATTER OF LAW.

A. The *Terry* Stop Escalated into an Arrest Before the Officers Had Probable Cause

The evidence also supports the reasonable conclusion that Klotka and Zuberbier arrested Matz without probable cause. Namely, a jury could find

[4] In their Motion for Summary Judgment, Defendants only raised the defense of qualified immunity with respect to Matz's Fourth Amendment *Terry* stop and arrest claims. (*See* R.71 at 14-19.)

that the *Terry* stop escalated into an arrest either because (1) the use of force in stopping Matz was not reasonably necessary under the circumstances to protect officer safety, or (2) the duration and scope of the stop exceeded the original justification for the detention. Under either circumstance, an arrest occurred before the officers knew that the vehicle Matz was driving was stolen, which was the only identified basis for probable cause.

If a *Terry* stop continues "longer than is necessary to effectuate the purpose of the stop," or is "unreasonably intrusive," it can ripen into a de facto arrest requiring probable cause. *United States v. Bullock*, 632 F.3d 1004, 1015 (7th Cir. 2011) (citing *United States v. Robinson*, 30 F.3d 774, 784 (7th Cir. 1994)). To remain within the bounds of *Terry*, the investigation following a stop "must be reasonably related in scope and duration to the circumstances that justified the stop in the first instance so that it is a minimal intrusion on the individual's Fourth Amendment interests." *Id.* at 1015 (citing *Robinson*, 30 F.3d at 784). "[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500 (plurality op.).

Moreover, because "[a] *Terry* stop (which typically precedes a frisk) is still limited to 'maintaining the status quo' for purposes of investigation[,] [w]hen a police officer frisks first and asks questions later, that order of investigation must be a reasonable precaution for the officer's safety." *Wheeler*, 800 F.2d at 104. If the "officers use unnecessary force to effectuate a stop, they risk 'arresting' the individual without the requisite probable cause." *Id.*

"Probable cause requires sufficient evidence to lead a reasonable and prudent person to believe, not merely suspect, that a crime has been or is being committed." *Moya v. United States*, 761 F.2d 322, 325 (7th Cir. 1984). Because a finding of probable cause has "implications for personal privacy," this Court has instructed that the standard for assessing probable cause must "be rigorously enforced." *Id.* at 325.

Additionally, officers cannot justify an arrest based on subsequently learned information. *See Haywood v. City of Chicago*, 378 F.3d 714, 717 (7th Cir. 2004) ("[W]hat an arresting officer does not know is inadmissible to show that he had probable cause for the arrest—otherwise hindsight would validate every arrest of a person who turned out to be a criminal.") (citation omitted); *Llaguno v. Mingey*, 739 F.2d 1186, 1191 (7th Cir. 1984) ("The officers needed probable cause before they entered the house. The entry cannot be justified by information obtained subsequently."). Thus, if the arrest occurred before Klotka and Zuberbier learned that the vehicle was stolen, Matz's Fourth Amendment rights were violated.

Here, weighing all disputed facts and drawing all reasonable inferences in favor of Matz, the evidence supports at least two different scenarios whereby a jury could conclude that the initial investigatory stop exceeded the permissible bounds of *Terry* before Klotka and Zuberbier had probable cause for an arrest. Because "[t]he difference between a *Terry* stop and an arrest is merely one of degree which makes the determination difficult in some

circumstances," *United States v. Novak*, 870 F.2d 1345, 1352 (7th Cir. 1989), in this case, the jury should decide when the arrest occurred.

1. Klotka and Zuberbier's Use of Force Immediately Transformed the *Terry* Stop into a De Facto Arrest.

First, the facts support the reasonable conclusion that Klotka and Zuberbier used greater force than was reasonably necessary to protect their safety when they removed Matz from the vehicle. As a result, they elevated the stop to an arrest without probable cause.

Klotka and Zuberbier do not dispute that upon seeing Matz's vehicle, they immediately drew their firearms, stopped the vehicle, ordered Matz out of the vehicle under the threat of blowing his head off, forced him to his knees at gunpoint, and handcuffed him. (R.93 ¶ 25.) This Court has found that similar facts amount to an arrest. *See Lawrence v. Kenosha Cnty.*, 391 F.3d 837, 842 (7th Cir. 2004) (finding investigatory stop transformed into a seizure requiring probable cause "when [officer] grabbed [plaintiff's] arm and attempted to physically remove him from his vehicle" because "[a] reasonable person, at that point, would have felt that he was not free to leave").

To determine whether this use of force nevertheless was reasonably necessary to protect officer safety (and to keep the stop within *Terry*), this Court considers "[t]he nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the approach of the police." *United States v. Ocampo*, 890 F.2d 1363, 1369 (7th Cir. 1989). In this case, as discussed above, there is a genuine dispute of material fact as to the neighborhood's crime-level—a fact

that inherently implicates the level of force an officer would have believed was reasonably necessary to effectuate a stop while limiting any risks to officer safety. Further, the stop occurred in the early evening, and it is undisputed that Matz immediately complied with all of Klotka and Zuberbier's orders. And at the time they stopped the car, Klotka and Zuberbier had no evidence that Matz was armed or had committed any crimes. As a result, the evidence, viewed in the light most favorable to Matz, supports the reasonable conclusion that Klotka and Zuberbier used more force than was reasonably necessary under the circumstances, transforming the stop into an arrest without probable cause.

2. The Scope and Duration of the Detention Exceeded the Justification for the Stop.

Second, on this record a jury alternatively could conclude that the scope and duration of the detention ultimately exceeded the justification for the stop. *See Bullock*, 632 F.3d at 1015. The initial stop was tied to Klotka and Zuberbier's alleged suspicion that Salazar had committed a felony robbery and was on the porch at 1335 S. Layton Blvd. Klotka and Zuberbier do not dispute that they knew Salazar was not in Matz's vehicle when they stopped it. Nor did Defendants contend that the search of Matz or the vehicle provided probable cause to believe that Matz had been, was, or would be engaged in criminal activity. From these facts, a jury reasonably could conclude that Matz's continued detention was "longer than [was] necessary to effectuate the purpose of the stop," *id.* at 1015, and that the officers did not employ the "least intrusive means reasonably available to verify or dispel [their] suspicion in a

short period of time," *Royer*, 460 U.S. at 500. As a result, a jury could find that the stop turned into an arrest requiring probable cause.

B. The District Court Failed to Identify When the Arrest Occurred.

Although the probable cause standard to justify an arrest is more demanding than the reasonable suspicion standard for a *Terry* stop, the district court in this case never identified when the *Terry* stop escalated into an arrest. This was error.

An arresting officer cannot rely on later discovered information to satisfy the probable cause requirement. *See Haywood*, 378 F.3d at 717; *Llaguno*, 739 F.2d at 1191. Thus, the timing when the arrest occurs necessarily is relevant for initially identifying whether the probable cause or reasonable suspicion standard applies to justify the stop.

In this case, Defendants encouraged the district court to ignore the distinction between the *Terry* stop and the arrest, conceding that "it is not clear" if Klotka and Zuberbier arrested Matz or if they merely detained him for a reasonable period of time before discovering that the car Matz was driving was stolen. (R.71 at 14.) According to Defendants, the timing of the arrest ultimately was irrelevant because "at the scene there was probable cause to arrest Matz once it was discovered that the car had been reported stolen." (*Id.*)

The district court, apparently accepting Defendants' position, never identified when the arrest actually occurred. Instead, it concluded that Matz's Fourth Amendment rights were not violated because "a great amount of time could not have elapsed between the stop and the discovery that the vehicle was

stolen." (A.13.) Because, as discussed above, a reasonable jury could conclude that the *Terry* stop turned into an arrest before the officers had probable cause (*i.e.*, learned that the car was stolen), the district court's judgment in favor of Defendants on Matz's Fourth Amendment unlawful arrest claim should be reversed.

C. Qualified Immunity Does Not Protect Klotka and Zuberbier.

Although the district court never reached the issue of qualified immunity, Klotka and Zuberbier are not entitled to such protection here. "[T]he contours of the constitutional right . . . to be free from arrest without probable cause . . . were clearly established when the events in question took place." *Jones v. Clark*, 630 F.3d 677, 682 (7th Cir. 2011). Accordingly, "the only question" for purposes of the qualified immunity analysis "is whether, under [Matz's] version of the facts, [the defendant officers] violated these clearly established rights." *Id.* For the reasons explained above, under Matz's version of the facts, a jury could conclude that Klotka and Zuberbier arrested Matz without probable cause. The district court, therefore, erred in entering judgment in favor of Defendants on this claim.

III. THE DISTRICT COURT LEGALLY ERRED IN FINDING THAT MATZ RECEIVED THE CONSTITUTIONALLY REQUIRED PROBABLE CAUSE DETERMINATION WITHIN FORTY-EIGHT HOURS OF HIS ARREST.

The district court also erred in concluding that the arrest and detention record produced by Defendants established that Matz received the constitutionally required probable cause determination within forty-eight hours of his arrest as mandated by *Riverside*, 500 U.S. 44. Because Milwaukee

County's practice of allowing a court commissioner to make a probable cause determination based on arrest and detention reports improperly allows unsworn statements to serve as the basis for the probable cause determination, the commissioner's probable cause determination in this case was constitutionally deficient.

It is well-established that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). In *Riverside*, the U.S. Supreme Court further held that this probable cause determination must be made within forty-eight hours of arrest. *Riverside*, 500 U.S. at 56. After this period, "the calculus changes," and "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.* at 57.

Here, Matz was arrested on September 16, 2003, but did appear for an initial appearance before a judicial officer until seven days later on September 23, 2003 (R.93 ¶ 50)—well outside of *Riverside*'s forty-eight hour window. Defendants, however, contend that Matz's arrest report (R.73 at 4-7), proves that a probable cause determination was made on September 18, 2003, at 10:58 a.m. by Milwaukee County Court Commissioner Liska. The arrest report's "Probable Cause Determination" box bears a signature purporting to be Commissioner Liska's. (*Id.* at 6.) This arrest report is the only evidence in the record that a probable cause determination was made within the *Riverside* time-frame. But because the report contains *unsworn* officer statements and

Matz's allegedly involuntary confession, it cannot be the basis for the probable cause determination.

"[T]he Fourth Amendment is explicit that 'no Warrants shall issue, but upon probable cause, *supported by Oath or affirmation*.'" *Haywood*, 378 F.3d at 717 (emphasis added). The same constitutional requirement applies to establish probable cause after a warrantless arrest. *See id.* at 718 ("[Defendants'] further argument—that because the Fourth Amendment mentions 'Oath or affirmation' only in connection with the issuance of warrants, less evidence is required to detain a person indefinitely than to arrest him even though the curtailment of liberty is greater—is wooden and was rejected by the Supreme Court in *Gerstein* . . . .").

Wisconsin law similarly requires that the probable cause determination be based on oral or written sworn testimony. Section 968.04(1) of the Wisconsin Statutes mandates that the probable cause for a warrant be based on "the complaint," "an affidavit of affidavits filed with the complaint," or "an examination under oath of the complainant or witnesses." In *Wisconsin v. Evans*, 522 N.W.2d 554 (Wis. Ct. App. 1994), the court held that "[b]ecause the items enumerated in § 968.04(1) . . . all require an oath or affirmation, . . . any item used as a basis for probable cause in post-warrantless arrest determinations must also be sworn to, either orally or in writing." *Id.* at 562 (recognizing that "unsworn police show-up report" could not support probable cause determination); *see also Illinois v. Dinger*, 435 N.E.2d 1348, 1350 (Ill.

App. Ct. 1982) ("The necessity of a sworn statement or one made under oath is not a minor defect which does not prejudice the rights of the accused.").

Here, the Probable Cause Statement in the arrest report contains unsworn statements which the commissioner could not have relied upon in making the probable cause determination. The first paragraph of that statement reads:

> This report is written by Police Officer Richard Wearing assigned to the CIB Warrant Sq. On Tuesday 09.16.03 SQ 130 Officers Karl Zuberbier and Rod Klotka observed a wanted subject Salazar, Javier O w/m, 01.28.81 at 1335 S. Layton. Upon approch [sic] this subject fled to the rearyard of the house and into a vehicle. This subject started the vehicle and backed the vehicle up into the alley. This subject was stopped at that point and taken into custody. A check of the vehicle revealed it to be taken on 9-13-03.

(R.73 at 6.) Significantly, neither Richard Wearing, Zuberbier, nor Klotka swore to this statement under penalty of perjury, and their signatures do not even appear on the arrest report. As this Court recognized in *Haywood*, "It is the prospect (remote as it may be) of prosecution for perjury, plus whatever slight moral pressure the taking of a solemn oath may still exert, that furnishes the rational for preferring sworn to unsworn testimony." 378 F.3d at 719. In this case, the unsworn statements in the police report were not accompanied by the threat of prosecution for perjury, thereby undermining not only the statement's reliability but also the reliability of the commissioner's probable cause determination.

Indeed, the inconsistencies in this statement itself demonstrate the potential for error and oversight when an officer provides a constitutionally required statement without the concurrent "moral pressure" of "the taking of a

solemn oath." *Id.* As Defendants concede, "The probable cause statement is confusing in its initial paragraph because it refers to both Javier Salazar and Shaun Matz as a 'subject.'" (R.91 at 15.)

The second half of the Probable Cause Statement appears to be written by Gary W. Temp, who swore to the statement before a public notary. (R.73 at 6-7.) The portion of the statement authored by Temp, however, involves Matz's confession (*see id.*), which Matz maintains was obtained in violation of his Fifth Amendment rights. If Matz prevails on his Fifth Amendment claim, that statement similarly should not be a basis for the probable cause determination. *See Miranda v. Arizona*, 384 U.S. 436, 474 (1966); *United States v. Swanson*, 635 F.3d 995, 1001 (7th Cir. 2011) ("The protection that the Fifth Amendment provides 'reflects a judgment that the prosecution should not be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused.'" (quoting *Doe v. United States*, 487 U.S. 201, 212 (1988)).

Although probable cause "can be determined reliably without an adversary hearing," *Gerstein*, 420 U.S. at 120, "[w]hatever procedure a State may adopt . . . must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty," *id.* at 124-25; s*ee also Riverside*, 500 U.S. at 55 ("The Court recognized in *Gerstein* that a person arrested without a warrant is entitled to a fair and reliable determination of probable cause and that this determination must be made promptly."). Here, Milwaukee County's policy of allowing court commissioners to make a probable

cause determination based only on an arrest record violated and undermined Matz's right to a "fair and reliable determination of probable cause." Because the commissioner's probable cause determination was constitutionally deficient, Matz never received the requisite determination within forty-eight hours of his arrest. The district court, therefore, erred in finding as a matter of law that Matz's continued detention by the Defendant Detectives did not violate *Riverside*. *See Haywood*, 378 F.3d at 717-20 (reversing grant of summary judgment with respect to continued detention claim because probable cause determination was based on falsely sworn complaint).

IV. THE DISTRICT COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF DEFENDANTS ON MATZ'S FIFTH AMENDMENT CLAIM.

Matz's Fifth Amendment claim is based on an inculpatory statement implicating Matz in two homicides which he made during the Defendant Detectives' final interrogation. Matz maintains that this statement was untrue and was obtained in violation of his constitutional right to remain silent and to counsel. Without reaching the merits, the district court concluded that *Heck*, 512 U.S. 477, barred this claim. This was legal error. Because success on Matz's Fifth Amendment claim will not "necessarily imply the invalidity of his conviction or sentence," allowing Matz to proceed on this claim does not undermine *Heck*. Moreover, the undisputed evidence, viewed in the light most favorable to Matz, supports the reasonable conclusion that the Defendant Detectives violated Matz's Fifth Amendment rights. The district court, therefore, erred in entering judgment in favor of Defendants on this claim.

A. *Heck v. Humphrey* Does Not Bar Matz's Fifth Amendment Claim Because Success on that Claim Will Not Necessarily Imply the Invalidity of His Conviction or Sentence.

In their Motion for Summary Judgment, Defendants argued that *Heck*, 512 U.S. at 487, barred Matz's Fifth Amendment claim because the statement at issue implicated Matz's conviction and sentence.[5] The district court agreed that *Heck* barred this claim, finding that Matz's sentence "was based, at least in part, on the plaintiff's statements [to the Defendant Detectives] and his later disavowal of it." (A.17.) As a result, the district court concluded, Matz's "inculpatory statement to the police is simply too intertwined with his sentence for the plaintiff to proceed on this claim." (*Id.*) This was error. Matz's Fifth Amendment claim does not necessarily undermine the validity of his conviction or sentence. *Heck*, therefore, is not a bar.

In *Heck*, the Supreme Court held that, "unless . . . the conviction or sentence has already been invalidated," a § 1983 action for damages is barred if "judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. Where, however, success on a claim "does not mean immediate release from confinement or a shorter stay in prison," the claim does not lie "at the core of habeas corpus," and consequently is not barred by *Heck*. *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)).

[5] For purposes of their Motion for Summary Judgment, Defendants did not dispute that the interrogation that resulted in Matz's inculpatory statement violated Matz's Fifth Amendment rights. (*See* R.71 at 16-18.)

In this case, the district court erred in concluding that Matz's Fifth Amendment claim necessarily undermines the validity of Matz's sentence. *First*, the sentencing court did not base the sentence on Matz's prior confession. Rather, that court's references to Matz's inculpatory statements merely provided context for the court's findings with respect to Matz's perceived level of remorse. These findings were based on statements Matz made to the court during the sentencing hearing—not on his confession.

Specifically, during his sentencing, Matz explained that he previously confessed "out of loyalty." (A.24 at 46:2.) The sentencing court found that this explanation demonstrated a lack of genuine remorse:

> That's not somebody who's confessing out of compassion and thoughtfulness for the family and an understanding of the wrongfulness of his actions. It's someone who's confessing, by your own words, because that's what a Latin King does. . . . You're angry about the fact that you were going to fall on your sword for people who now don't deserve it because they squealed on you, not because you found religion and you're repentant for what you did to these two other human beings.

(A.26-27 at 58:8-59:6.) Based on this perceived lack of remorse, the sentencing court concluded: "I think you are a high risk to reoffend because I don't believe, even though you're remorseful or you express some sort of remorse, the fact is that it is sort of a selfish, self-centered remorse." (A.28 at 64:21-25.) Consequently, when viewed in the appropriate context, the references to Matz's disavowed confession were at most tangential to the court's rationale for its imposed sentence. Allowing Matz to proceed on this claim, therefore, will not undermine *Heck*.

Second, even if the sentencing court's comments could be interpreted as relying on the contents of Matz's prior confession, the "availability of other evidence" supporting the sentence precludes a *Heck* bar. *See Kramer v. Village of N. Fond du Lac*, 384 F.3d 856, 862 (7th Cir. 2004) (recognizing that *Heck* was not a bar due to "[t]he availability of other evidence to support a conviction"). Here, the sentencing court had evidence before it that Matz had confessed to his girlfriend and to other co-defendants. (A.21 at 17:9-23; A.24 at 46:21-22; R.93 ¶ 73.) Thus, the confession underlying Matz's Fifth Amendment claim was not necessary to the court's sentencing determination.

Third, Matz is not seeking "immediate release from confinement or a shorter stay in prison," *Wilkinson*, 544 U.S. at 82, but rather compensation for the harms he endured during the improper detention resulting from this unlawfully obtained confession. Again, *Heck* does not bar such claims. *See id.*

Finally, although the district court in this case focused its *Heck* analysis on Matz's sentence, not his conviction, the Defendants' Motion for Summary Judgment additionally contended that Matz's Fifth Amendment claim implicates the validity of his conviction.[6] To the contrary, because Matz ultimately pled guilty, the State did not need those statements to obtain a conviction. *See Haring v. Prosise*, 462 U.S. 306, 316 (1983) ("Neither state nor federal law requires that a guilty plea in state court be supported by legally admissible evidence where the accused's valid waiver of his right to stand trial

[6] In their Reply to their Motion for Summary Judgment, Defendants appear to abandon this theory and instead focus on the impact of the Fifth Amendment claim on Matz's sentence, not his conviction. (R.91 at 9-10.)

is accompanied by a confession of guilt."). Thus a finding in Matz's favor on his Fifth Amendment claim does not necessarily implicate the validity of his conviction, and *Heck*, therefore, is not a bar.

For the above reasons, the district court erred in concluding that *Heck* barred this claim.

B. The Evidence, Viewed in the Light Most Favorable to Matz, Precludes Summary Judgment on Matz's Fifth Amendment Claim.

In their Motion for Summary Judgment, Defendants did not dispute that Matz's inculpatory statement was a result of a violation of his Fifth Amendment rights. Instead, they argued that *Heck* barred the claim. As a result, the district court never reached the merits. The facts in the record, however, are sufficient to present Matz's Fifth Amendment claim to a jury. *See Sornberger*, 434 F.3d 1006 (reversing grant of summary judgment on Fifth Amendment claim based on genuine issues of material fact).

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Thus, when a suspect invokes his constitutionally protected right to remain silent, "the interrogation must cease." *Miranda*, 384 U.S. at 474.

In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Supreme Court set forth a multi-factor test for determining "whether a suspect's 'right to cut off questioning' was 'scrupulously honored.'" *United States v. Schwensow*, 151 F.3d 650, 658 (7th Cir. 1998). Those factors include "the amount of time that lapsed between interrogations; the scope of the second interrogation; whether

new *Miranda* warnings were given; and the degree to which police officers pursued further interrogation once the suspect had invoked his right to silence." *Id.* Further, "the constitutionality of a subsequent police interview depends . . . on whether the police, in conducting the interview, sought to undermine the suspect's resolve to remain silent." *Id.* at 659. The question of whether Matz provided the Defendant Detectives "with a knowing and voluntary waiver of his *Miranda* rights is essentially one of fact." *Id.* at 660.

Here, despite Matz's repeated invocations of his right to remain silent, the Defendant Detectives continued to question him for hours at a time with only a minimal break between interrogations. The sequence of events leading up to Matz's confession was undisputed for purposes of Defendants' Motion for Summary Judgment.[7]

When Matz was in the paddy wagon, Caballero began questioning him about two homicides. (R.93 ¶¶ 31, 34.) At this time, Matz stated that he did not want to talk and wanted an attorney. (*Id.* ¶ 34.) Nevertheless, Caballero continued to interrogate Matz. (*Id.*) Then, at the police station, on September 17, 2003, at 6:20 a.m., Matz was removed from his cell for further interrogation by Jones and Moore. (*Id.* ¶ 36.) At the beginning of this interrogation, Matz told them that he did not wish to speak with them or anyone else about any homicides or shootings and that he wanted to go back to his cell. (*Id.* ¶ 40.) Jones and Moore, however, continued to question him about two homicides for over four hours. (*Id.* ¶¶ 42, 45.) They tried to persuade Matz to talk to them.

[7] Defendants only objected to Matz's proposed facts related to his Fifth Amendment claim on the basis of relevance. (*See* R.93 ¶¶ 31-49, 74-75.)

(*Id.* ¶ 43.) At one point during the interrogation, Moore told Matz that it would go easier for him if he just cooperated and told them what happened. (*Id.*) Jones and Moore questioned Matz for four hours before he was returned to his cell. (*Id.* ¶ 45.)

Then, at around 8:52 p.m. that same day, Matz was once again removed from his cell for interrogation, this time by Walton and Caballero. (*Id.*) Again, Matz told the detectives that he did not want to speak with them. (*Id.* ¶ 46.) But they continued to question Matz about two homicides. (*Id.*) Despite acknowledging that Matz had certain rights, Walton told Matz that he would give them a statement regardless of those rights. (*Id.* ¶ 47.) During this final interview, Matz was sitting in a defeated position. (*Id.* ¶ 75.) Eventually, as a direct result of the Defendant Detectives ignoring Matz's repeated invocation of his right to remain silent, Matz made a statement about his involvement in two homicides. (*Id.* ¶ 48.) Matz maintains that the statement was not true and that he believed that making a statement was the only way Walton and Caballero would return him to his cell. (*Id.*) Finally at 2:50 a.m.—six hours after that last interrogation started—Matz was returned to his cell. (*Id.* ¶ 49.)

During this same period, Matz was battling a host of mental health issues which required medication that he did not have while under arrest, and he also had just been released from the hospital two days earlier for pneumonia. (*Id.* ¶¶ 37-39.)

On the these facts, a jury reasonably could conclude that Matz's confession was involuntary and that the Defendant Detectives "sought to

undermine" his right to remain silent. The district court, therefore, erred in entering judgment in favor of Defendants on Matz's Fifth Amendment claim.

CONCLUSION

For the above reasons, the district court erred in entering judgment in favor of Defendants on Matz's claims. Matz respectfully requests that this Court reverse the district court's judgment and remand for a jury trial on Matz's Fourth Amendment and Fifth Amendment claims against Defendants Klotka, Zuberbier, Jones, Moore, Caballero, and Walton.

Dated: March 12, 2013

Respectfully submitted,

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Pro-Bono Attorneys for Plaintiff-Appellant Shaun J. Matz (State Prisoner: #264654)

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9865 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 2007 in Bookman Old Style 12pt.

Dated: March 12, 2013

/s/ Marron A. Mahoney
Marron A. Mahoney

CIRCUIT RULE 30(D) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rule 30(a) and (b) are included in the appendix bound with the brief.

Dated: March 12, 2013

/s/Marron A. Mahoney
Marron A. Mahoney

CERTIFICATE OF SERVICE

I hereby certify on this 12th day of March, 2013, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Marron A. Mahoney
Marron A. Mahoney

APPENDIX TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SHAUN J. MATZ,

Plaintiff,

-vs- Case No. 08-C-0494

RODNEY KLOTKA, KARL ZUBERBIER, SHANNON JONES, PERCY MOORE, MARK WALTON, MICHAEL CABALLERO, JOHN DOES 1-100, and JANE DOES 1-100,

Defendants.

DECISION AND ORDER

The plaintiff, Shaun J. Matz, is proceeding *pro se* in an action brought under 42 U.S.C. § 1983. He was allowed to proceed on Fourth and Fifth Amendment claims against defendants Rodney Klotka, Karl Zuberbier, Shannon Jones, Percy Moore, Mark Walton, Michael Caballero, John Does 1-100, and Jane Does 1-100.[1] The Fourth Amendment claims are based on the plaintiff's averments that he was unlawfully seized and denied a probable cause determination within forty-eight hours of his arrest. The Fifth Amendment claim is based on the plaintiff's averments that he was questioned after he

[1] In addition to the six named defendants, the plaintiff named the City of Milwaukee, Milwaukee County, John Does 1-100, and Jane Does 1-100 as defendants in his Second Amended Complaint, filed July 2, 2010. In a Decision and Order dated July 20, 2010, the Court dismissed the City of Milwaukee and Milwaukee County but allowed the plaintiff to proceed on the remaining claims. The plaintiff was allowed to proceed on his claims against the John Does and Jane Does, but they were never identified and served. As a result, the plaintiff's claims against them will be dismissed with prejudice.

invoked his right to remain silent. Now before the Court is the defendants' motion for summary judgment.

I. SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665, 668 (7th Cir. 2011). "Material facts" are those under the applicable substantive law that "might affect the outcome of the suit." *See Anderson*, 477 U.S. at 248. A dispute over "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: "(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

II. FACTS[2]

The plaintiff is a state prisoner who is housed at Columbia Correctional Institution. He is serving a sixty-year prison sentence for one count of first-degree reckless homicide and one count of felony murder with armed robbery as the underlying crime.

The plaintiff was arrested on September 16, 2003. On the day of his arrest, defendants Karl Zuberbier and Rodney Klotka were assigned to the same squad car. Defendant Zuberbier is employed by the Milwaukee Police Department (MPD) and was assigned to the warrant squad at all times relevant. Defendant Klotka is retired from the MPD and served as a police officer on the warrant squad at all times relevant.

Defendants Zuberbier and Klotka were both in uniform but were in an unmarked police vehicle. They had located an individual suspected of stealing a police officer's gun on the 2500 block of West Greenfield Street and, in the course of resolving that matter, drove toward a restaurant on 25th and National Avenue. They eventually turned north onto Layton Boulevard. As they turned onto Layton, the defendants identified Javier Salazar sitting on a porch with other individuals. The defendants were aware that Salazar was wanted for armed robbery and that there was a "temporary felony want" for his arrest. (Defendants' Proposed Finding of Fact [DPFOF] ¶ 9.) The defendants believed that Salazar was a member of the Latin Kings gang, and Zuberbier had previously been informed that Salazar was a suspect in two homicides and several shootings.

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[2] The Facts are taken from the parties proposed findings of fact and affidavits. Where there are disputes, the Court has presented the plaintiff's version of the facts. *See Gonzalez v. City of Elgin*, 578 F.3d 526, 529 (7th Cir. 2009).

When Zuberbier told Klotka about Salazar's identity, Klotka turned and looked at the individuals on the porch. This action took away the "element of surprise [which] always works on the police side." (Smokowicz Aff., Attachment B [Klotka Dep.] at 35-36). Klotka, who was driving the vehicle, made a u-turn. According to the defendants, "[a]s soon as the squad car started to make the turn, the people on the porch began to disperse." (DPFOF ¶ 18.) By the time the vehicle had stopped, no individuals remained on the porch. The plaintiff denies any implication that he witnessed Klotka making the turn and avers that he left the porch before the car made the u-turn.

Defendants Klotka and Zuberbier ran after the individuals on the porch. Klotka ran on the south side of the porch while defendant Zuberbier ran down an alley toward the backyard. As he was running down the alley, Zuberbier saw two males and a female running southbound in the alley. Zuberbier avers that he saw two additional people in a car on a parking slab adjacent to the alley. The car began pulling out of the alley as he was coming into the yard. Klotka approached the vehicle and saw two occupants in it, but he noticed that Salazar was not in the vehicle. Klotka proceeded to point his gun at the car and told the plaintiff, who was driving the vehicle, to stop. Zuberbier pointed his gun at the plaintiff, swore at him and threatened to blow his head off unless he stopped the vehicle. The plaintiff stopped the vehicle for fear of being shot. Klotka directed the plaintiff out of the vehicle at gun point and cuffed him. Klotka then searched the plaintiff while Zuberbier searched the car. Klotka did not know the vehicle was stolen when he stopped it, but, prior to the arrival

of the other officers, Zuberbier checked the VIN number and learned that the vehicle was stolen. At least six other squads ultimately responded to the scene.

The plaintiff was placed in the back of a paddy wagon, where he was approached by two detectives, one of whom was defendant Michael Caballero, a detective in the homicide division of the MPD in September 2003. As the detectives entered the paddy wagon, the detective with Caballero swore at the plaintiff, grabbed him by the throat, and pushed him against the wall of the paddy wagon. Caballero grabbed the plaintiff by his left arm, looked at the plaintiff's tattoos, and stated, "he's one of them." (Declaration of Shaun J. Matz [Matz Dec.] ¶ 27.) The detectives began to interrogate the plaintiff about two homicides. The plaintiff responded by stating that he did not want to talk and wanted an attorney, but the detectives continued to interrogate the plaintiff. Eventually, the plaintiff was taken downtown to the police station for booking and further interrogation.

At the time of his arrest, the plaintiff was battling a number of mental health issues. He did not have his anti-psychotic and anti-depressant medication with him. When the plaintiff was not on his medication, his thought process, mood and impulsivity were greatly impaired, calling into question his ability to make informed decisions and disrupting his ability to think clearly. The plaintiff also had recently been in St. Luke's Hospital for two days for pneumonia.

Defendants Shannon Jones and Percy Moore served as detectives in the homicide division of the Milwaukee Police Department in September 2003. They interviewed the plaintiff on September 17, 2003. The plaintiff was removed from his cell at

about 6:20 a.m. After the plaintiff was read his Miranda rights, he informed defendants Jones and Moore that he did not wish to speak with them or anyone else about the homicides and the shootings and that he wanted to go back to his cell. The plaintiff was not returned to his cell until almost 11:00 a.m. Jones and Moore questioned the plaintiff about two homicides and an armed robbery. They attempted to cajole the plaintiff into talking. For example, Moore told the plaintiff at one point that it would go easier for him if he just cooperated and told them what happened. When the detectives realized that they were not going to get a statement from the plaintiff, they noted on his interrogation form that he did not want to talk to them. However, they failed to note his exact response, which was that he did not want to speak with anyone at any point about the shootings and the homicides.

The plaintiff was removed from his cell for further interrogation around 8:52 p.m. that evening. This time, it was defendants Michael Caballero and Mark Walton, both detectives in the homicide division of the MPD in September 2003, who conducted the interrogation. The plaintiff told Caballero and Walton that he did not want to speak with them, but they continued to question the plaintiff about two homicides. Walton acknowledged that the plaintiff had certain rights, but said the plaintiff would give them a statement regardless. The plaintiff was sitting in a defeated position during this interview. Eventually, and as a direct result of the defendants ignoring the plaintiff's invocation of his right to remain silent, the plaintiff provided a statement concerning his involvement in two homicides. The plaintiff avers that the statement was not true but that he provided it because

he believed it was the only way they would return him to his cell. He was returned to his cell at 2:50 a.m., six hours after the interrogation began.

On September 18, 2003, at approximately 10:58 a.m., Milwaukee County Court Commissioner Liska found that there was probable cause that a crime had been committed and that the plaintiff had committed the crime. The Commissioner also set cash bail of $100,000.00. A copy of the arrest-detention report bearing the signature of Commissioner Liska is attached to the affidavit of Milwaukee County Sheriff Department Captain Anthony Moffett. Captain Moffett avers that he is "employed by the Milwaukee County Sheriff's Department and in [that] position [has] access to arrest records maintained in the routine course of business of the department concerning individuals who have been held in custody in the jail facilities operated by the department." (Moffett Aff. ¶ 1.)

III. DISCUSSION

The defendants assert that they are entitled to summary judgment on the plaintiff's Fourth Amendment claims because they had reasonable suspicion to stop the plaintiff and probable cause to arrest him; they also contend that they are entitled to qualified immunity. Next, they submit that they are entitled to summary judgment on the plaintiff's claim regarding a prompt probable cause hearing because they submitted evidence that a probable cause determination was made by a Milwaukee County Court Commissioner within forty-eight hours of the plaintiff's arrest. Finally, with regard to the plaintiff's Fifth Amendment claim, the defendants assert that the plaintiff's claim is barred by *Heck v.*

Humphrey, 512 U.S. 477 (1994), because the statement the plaintiff finally gave was relied on, at least in part, during the plaintiff's sentencing.

In response, the plaintiff contends that there are genuine issues of material fact regarding whether defendants Klotka and Zuberbier had reasonable suspicion to stop the plaintiff and/or probable cause to arrest him. Moreover, the plaintiff asserts that qualified immunity does not apply to the present case. The plaintiff also argues that there are genuine issues of material fact regarding whether the plaintiff received a timely and meaningful probable cause determination. Finally, the plaintiff asserts that his prior conviction does not interfere with his § 1983 claim, as statements from the plaintiff's second interrogation were not used as part of his sentencing.

A. Unlawful Arrest Claim

The plaintiff maintains that defendants Klotka and Zuberbier did not have reasonable suspicion to stop him and that they lacked probable cause to arrest him.

1. Stop

The Fourth Amendment protects against unreasonable searches and seizures. *Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074, 2080 (2011). The Supreme Court has held that an investigative stop does not violate the Fourth Amendment if the officer conducting the stop had reasonable suspicion that the individual violated the law. *Terry v. Ohio*, 392 U.S. 1 (1968). Such a stop may be used to determine an individual's identity and obtain more information. *Pliska v. City of Stevens Point*, 823 F.2d 1168, 1176-77 (7th Cir. 1987).

In determining whether an officer had reasonable suspicion, courts take a "totality-of-the-circumstances" approach. *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002). Reasonable suspicion must be supported by specific, articulated facts from which the officer draws rational inferences. *Pliska*, 823 F.2d at 1176-77. Indeed, "the officer must be able to articulate more than an 'inchoate and unparticularized suspicion or hunch' of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (quoting *Terry*, 392 U.S. at 27). Courts may consider: (1) an individual's presence in an area of high crime; (2) his flight upon seeing police officers; and (3) his evasive behavior. *Wardlow*, 528 U.S. at 124-25. The Supreme Court has stated that an officer may have reasonable suspicion even if an individual's conduct may be innocent:

> Respondent and amici also argue that there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity. This fact is undoubtedly true, but does not establish a violation of the Fourth Amendment. Even in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation. The officer observed two individuals pacing back and forth in front of a store, peering into the window and periodically conferring. 392 U.S., at 5–6, 88 S.Ct. 1868. All of this conduct was by itself lawful, but it also suggested that the individuals were casing the store for a planned robbery. *Terry* recognized that the officers could detain the individuals to resolve the ambiguity. *Id.*, at 30, 88 S.Ct. 1868.

Id. at 125.

The Supreme Court has not determined whether flight, on its own, is sufficient to justify a *Terry* stop. *United States v. Wilson*, 2 F.3d 226, 231 (7th Cir. 1993). However, other courts have held that flight is not a "reliable indicator of guilty" without additional facts

supporting reasonable suspicion. *United States v. Green*, 670 F.2d 1148, 1152 (D.C. Cir. 1981).

Finally, the basis for a stop "must be particularized with respect to" the person being stopped. *Ybarra v. Illnois*, 444 U.S. 85, 91 (1979). For instance, in *United States v. Wheeler*, 800 F.2d 100 (7th Cir. 1986), the court stated that "while the defendant was with identifiable members of a gang, he himself was not known to be in the gang, and his affiliation alone with those gang members would be insufficient to uphold a *Terry* stop." (Pl.'s Resp. at 13) (citing *Wheeler*, 800 F.2d at 103). The *Wheeler* court ultimately upheld the *Terry* stop as reasonable under the Fourth Amendment because the defendant appeared to be carrying a weapon. *Id.*

The parties dispute whether the plaintiff actually fled from the police and whether the officers had sufficient information to conclude that the plaintiff was associating with a member of the Latin Kings. Whether or not the plaintiff actually saw and fled from the police is not material, as the *Wardlow* court noted that officers may detain individuals even if there is a possible innocent explanation for the behavior that forms the basis of the officer's reasonable suspicion. 528 U.S. at 124-25. Moreover, the plaintiff fails to cite evidence in denying that the officers had sufficient knowledge to conclude that Salazar was a gang member. The defendants have testified that they were aware that at least one individual on the porch was a known gang member. Both parties agree that the individuals on the porch scattered when the unmarked police car made a u-turn toward the house, although they dispute the possible explanations for this fact. In considering the totality of

the circumstances, these facts are enough to create reasonable suspicion even if there are possible innocent explanations for the plaintiff's and others' behavior. Thus, the plaintiff's Fourth Amendment rights were not violated with regard to the *Terry* stop.

Furthermore, the court need not consider whether flight or affiliation with gang members in and of themselves are sufficient to form the basis of reasonable suspicion in the present case. As previously noted, the plaintiff has not presented evidence to properly dispute the defendants' averments that they were aware of Salazar's gang activities. In addition, the court acknowledges the *Wheeler* court's holding that a person's "affiliation alone with . . . gang members [is] insufficient to uphold a *Terry* stop." (Pl.'s Resp. at 13) (citing *Wheeler*, 800 F.2d at 103). However, in this case, the officers were not solely relying on either the flight or affiliation. Indeed, the plaintiff's behavior as a whole suggested that he may have been involved in criminal activity. Thus, the officers were reasonable in detaining him to resolve any ambiguities. *See Wardlow*, 528 U.S. at 124-25.

2. Arrest

Next, the Court will consider whether there was probable cause to support the plaintiff's arrest. For an arrest to be lawful, it must be supported by probable cause. *Simkunas v. Tardi*, 930 F.2d 1287, 1291 (7th Cir. 1991). "Probable cause for an arrest exists if, at the time the arrest was made, the facts and circumstances within the police officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person to believe that an offense was committed." *Id.* Probable cause may be established by a report from a single and credible witness or by an identification. *Woods*

v. City of Chicago, 234 F.3d 979, 996 (7th Cir. 2000). Additionally, the fact that there may also be an innocent explanation for the behavior of an individual does not affect the probable cause determination. *United States v. Gomez*, 758 F. Supp. 145, 149 (S.D. N.Y. 1991); *United States v. Price*, 559 F.2d 494, 502 (2d Cir. 1979). Even if the individual is later determined to be innocent, officers "will be cloaked with qualified immunity" if probable cause existed at the time of the arrest. *Jenkins v. Keating*, 147 F.3d 577, 585 (7th Cir. 1998). Finally if a *Terry* stop continues too long or is "unreasonably intrusive," it can turn into a de facto arrest requiring probable cause. *United States v. Bullock*, 632 F.3d 1004, 1015 (7th Cir. 2011).

Here, the defendants admit that it is unclear whether the plaintiff was initially arrested or whether Klotka and Zuberbier simply detained the plaintiff for a reasonable period of time at the scene until it was discovered that the car the plaintiff was driving had been stolen and arrested him for operating a vehicle without an owner's consent. However, the plaintiff's own evidence suggests that his detention was not too long and that probable cause for his arrest, the fact that the car he was driving was stolen, was discovered quickly.

It appears, however, that there is some information missing from the facts before the court. For instance, the plaintiff makes arguments regarding marijuana found in the car, but there are no proposed findings of fact from either party regarding that issue. Additionally, in response to the defendants' proposed findings of fact, counsel for the plaintiff indicates that Zuberbier ran the VIN for the vehicle and discovered it was stolen before other officers arrived on the scene. The defendants had probable cause to arrest the

plaintiff once they knew the car the plaintiff had been driving was stolen. At least six other squads responded to the scene, as well as a paddy wagon to transport those who were arrested. In such a situation, even viewing the evidence in the light most favorable to the plaintiff, a great amount of time could not have elapsed between the stop and the discovery that the vehicle was stolen, given that the plaintiff argues Zuberbier ran the VIN before other police vehicles arrived at the scene. Additionally, the plaintiff's sequence of events makes it seem as though contraband might have been found in the car even before Zuberbier ran the VIN, which could have been another independent source of probable cause.

Accordingly, a reasonable fact finder could not concluding that the plaintiff was arrested without probable cause and, therefore, the defendants are entitled to summary judgment on the plaintiff's Fourth Amendment claim regarding his arrest.

B. Fourth Amendment Probable Cause Determination

The defendants submit evidence that a probable cause determination was made within forty-eight hours of the plaintiff's arrest and, therefore, argue that they are entitled to summary judgment on this claim.

"When a person is arrested without the benefit of a warrant supported by probable cause, the Fourth Amendment requires a judicial determination of probable cause to occur 'promptly' after their arrest." *Jones v. City of Santa Monica*, 382 F.3d 1052, 1055 (9th Cir. 2004) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975)). However, "judicial determination . . . may be informal and non-adversarial . . . and the Supreme Court has left to the States wide latitude to fashion probable cause determinations that 'accord with a

State's pretrial procure viewed as a whole."' *Id.* Moreover, "[i]n [*County of Riverside v.*] *McLaughlin*, [500 U.S. 44, 56 (1991),] the Supreme Court held that probable cause determinations made within 48 hours of arrest are presumptively prompt." *Jones*, 382 F.3d at 1055 (citing *McLaughlin*, 500 U.S. at 56).

The plaintiff contends that there are genuine issues of material fact regarding whether the plaintiff received a timely and meaningful probable cause determination. Specifically, he contends that Captain Moffett's affidavit fails to establish that he is the custodian or other qualified witness who can attest to the fact that the probable cause document was a document that was in fact kept during the regular course of business at the Sheriff's Department.

Under Federal Rule of Evidence 802, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Federal Rule of Evidence 803(6) states that records of "regularly conducted activity" may be excepted from the hearsay ban if certain conditions apply:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph

> includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The plaintiff argues that Captain Moffett fails to establish that he is the "custodian or other . . . witness" qualified to authenticate records of regularly conducted business. Fed. R. Evid. 803(6). However, Captain Moffett avers that he is "employed by the Milwaukee County Sheriff's Department and in [that] position [has] access to arrest records maintained in the routine course of business of the department concerning individuals who have been held in custody in the jail facilities operated by the department." (Moffett Aff. ¶ 1.) Contrary to the plaintiff's arguments, Rule 803(6) does not require the affiant to testify that he is the custodian, because it also allows other qualified witnesses to authenticate documents. As noted above, Captain Moffett has testified that arrest records were "kept in the regular course of business" and that "it was the regular practice of that business activity to make [such] record[s]." Fed. R. Evid, 803(6). He also refers to the record in his question in his affidavit and has compared the original copy of the arrest record to the copy attached to his affidavit. Thus, the arrest-detention record is properly authenticated. The court may consider "properly authenticated and admissible documents or exhibits" at the summary judgment stage. *Woods v. City of Chicago*, 234 F.3d 979, 988 (7th Cir.2000). The court will grant the portion of the defendants' motion for summary judgment relating to the plaintiff's Fourth Amendment "probable cause determination" claim.

C. Fifth Amendment

Next, with regard to the plaintiff's Fifth Amendment claim, the defendants assert that a § 1983 suit must be dismissed if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994); *see also Hoeft v. Anderson*, 409 Fed. Appx. 15, 2001 WL 195538, at *2 (7th Cir. 2011). The defendants explain that the plaintiff's Fifth Amendment claim is barred because he has not alleged that his conviction or sentence has been invalidated and because his conviction and sentence both depend at least in part upon his confession.

The plaintiff may not maintain a § 1983 action where a judgment in his favor would necessarily imply the invalidity of a previous criminal conviction that has not been reversed, expunged, or called into question by the issuance of a federal court writ of habeas corpus. *McCann v. Neilsen*, 466 F.3d 619, 620-21 (7th Cir. 2006) (citing *Heck*, 512 U.S. at 487).

The Seventh Circuit reversed and remanded this Court's dismissal of this case based on *Heck*, noting that Fourth Amendment claims for false or wrongful arrest are not barred under *Heck*. *See Copus v. City of Edgerton*, 151 F.3d 646, 648 (7th Cir. 1998). However, the plaintiff did not assert a violation of his Fifth Amendment rights in his original complaint. This claim was added in the Amended Complaint the plaintiff filed after remand.

The plaintiff argues that his prior conviction does not interfere with his § 1983 claim, as statements from the plaintiff's second interrogation were not used as part of his sentencing. He contends that the sentencing court relied primarily on statements made by the

plaintiff's co-defendants and other witnesses in sentencing him, not on statements obtained from the plaintiff's interrogation. In contrast, the defendants have cited the portions of the transcript of the plaintiff's sentencing where the trial court discussed the plaintiff's statement to the police, and his recanting of that confession at sentencing.[3] The court's sentence was based, at least in part, on the plaintiff's statements and his later disavowal of it. Without that statement, the sentence (or at least the reasoning underlying it) would have been different.

The plaintiff's inculpatory statement to the police is simply too intertwined with his sentence for the plaintiff to proceed on this claim. *See Hoeft*, 409 Fed.Appx. at 18. The invalidation of that statement would necessarily call into question the plaintiff's sentence. *See id.* As a result, the defendants are entitled to summary judgment on the plaintiff's Fifth Amendment claim because it is barred by *Heck*.

IV. ORDER

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment (Docket #70) is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiff's claims against defendants identified in plaintiff's Second Amended Complaint as John Does 1-100 and Jane Does 1-100 are **DISMISSED WITH PREJUDICE**.

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[3] The transcripts are part of the record in the plaintiff's petition for writ of habeas corpus case (*Matz v. Thurmer*, Case No. 08-C-294, E.D. Wis.); this Court denied that petition in a Decision and Order entered July 1, 2008.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 8th day of March, 2012.

BY THE COURT:

HON. RUDOLPH T. RANDA
U.S. District Judge

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

SHAUN J. MATZ
Plaintiff,

vs. CASE NUMBER: **08-C-494**

RODNEY KLOTKA, KARL ZUBERBIER, SHANNON JONES, PERCY MOORE, MARK WALTON, MICHAEL CABALLERO, JOHN DOES 1-100, and JANE DOES 1-100,

Defendants,

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came on for consideration and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendants' motion for summary judgment on plaintiff's Fourth Amendment claim that he was unlawfully seized and denied a probable cause determination within 48 hours of his arrest and his Fifth Amendment claim that he was questioned after he invoked his right to remain silent against defendants Klotka, Zuberbier, Jones, Moore, Walton, Caballero, John Does 1-100 and Jane Does 1-100 is **GRANTED**.

IT IS FURTHER ORDERED AND ADJUDGED plaintiff's claims against defendants identified in plaintiff's Second Amended Complaint as John Does 1-100 and Jane Does 1-100 are **DISMISSED WITH PREJUDICE.**

This action is hereby DISMISSED.

March 8, 2012
Date

JON W. SANFILIPPO
Clerk

s/Jacki L. Koll
(By) Deputy Clerk

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 05

STATE OF WISCONSIN,

Plaintiff,

-vs-

SENTENCING
Case No. 03CF005429

SHAUN MATZ,

Defendant.

ORIGINAL

CHARGE: 2 COUNTS, FIRST DEGREE INTENTIONAL HOMICIDE

JULY 29, 2004
MILWAUKEE, WISCONSIN
SAFETY BUILDING-ROOM 316

BEFORE:

THE HONORABLE MARY M. KUHNMUENCH
CIRCUIT JUDGE

APPEARANCES:

KAREN LOEBEL, Assistant District Attorney,
Appeared on behalf of the State of Wisconsin.

RICHARD JOHNSON, KATHY CHUNG, Attorneys-at-Law,
Appeared on behalf of the defendant.

Defendant appeared in person.

DAWN MALDONADO appeared as the Interpreter for Julio Ramirez.

Lori J. Cunico
Official Court Reporter

Mr. Rodriguez was not robbed because he ran to the police. It appears that that may have been a retaliation shooting or perhaps a shooting, because Mr. Rodriguez reached for the gun, whatever the cause was, he was an innocent person who was left to die there on the street with a gunshot wound to the back of his chest.

The defendant said that he did that murder, he gave a detailed confession to police several day later when he was arrested, but even before that the defendant bragged to Melissa Vanidestine, V-A-N -- I'm sorry, I'm going to have to get the spelling in a minute, I'll provide that to your court reporter. She talked to the police after the incident and said that when Mr. Matz ended up back at the us house where she was waiting he said, quote, did you see that dude who tried running fall like a bitch when I popped him, end quote.

She said that the defendant bragged about that and another shooting, shooting of Mr. Mariano, indicating that he -- that is Mr. Matz -- said he had, quote, shot that person in the back and it came out his

that it be less than what Salazar got.

Thank you.

THE COURT: Thank you, Mr. Johnson.

Mr. Matz, this is your opportunity to address the court. Anything you want to tell me before I sentence you, this is your chance to do that.

THE DEFENDANT: Your Honor, I just want to make it clear that I know what I did was wrong. You know, I did not kill Omar Rodriguez and Victoriano Mariano, but I was there, you know. I know that there was a gun, and I shouldn't have been there because there was a possibility of someone getting hurt. I didn't even know Victoriano Mariano or Omar Rodriguez. Never seen them before in my life. I'm not the one who picked them out as being robbed, but I know I was there and I know I did wrong. And I know I planned robberies and I know what I did was wrong. And I'm expected -- I'm accepting responsibility for what I did. That's all I can say. I accept full responsibility and punishment that I get.

THE COURT: Why is it, you suppose, that Mr. Salazar and Mr. Lynd and Mr. Gallegos and Mr. Montana and you are all sort of pointing the fingers at each other? I thought Latin King people didn't do that. I thought they were sort of straight up and took their medicine. Why is there a retaliation being planned? Why is everybody threatening each other in the jail, who said what? Why is it that I had to listen to a phone conversation that Salazar and his mother had in the jail about what an idiot you were for getting us all into this whole mess to begin with? Why is that the way this is all coming down after the fact?

THE DEFENDANT: I have -- I have -- as far as everybody else, I don't know, but I gave a statement to the detectives, because, you know, there's six of us on this case and I didn't want to get all of us to get locked up. I gave a statement to the detectives saying that I did everything and no one else had anything to do with anything out of loyalty, because I wanted everybody else to go home. I figured one got

locked up and the rest of us would be able to go home. I did it out of loyalty, you know.

I don't know why everybody's trying to do back biting now and stuff like that, but I think they finally realize that what they did was wrong, you know, and they don't want to go to prison for the rest of their lives. And they're trying to get out of it any way possible.

THE COURT: Does that include you?

THE DEFENDANT: I'm taking responsibility for what I did. I'm not trying to point fingers at any other people. I'm just trying to make the facts clear.

THE COURT: Everybody says you and Salazar were out of the cars both times, you and Salazar went up to reload the gun, you and Salazar had the gun in the seat behind you and next to you, you guys were the ones that were making the statements. Why did you confess to your girlfriend?

THE DEFENDANT: I had -- I had shot two people that same night. I haven't been charged with it, but I shot two people.

you're the strongest of the Latin King family. The rest of 'em are a bunch of cowards and chickens and God knows what else you want to call them under your breath. You were the man on one. I'll be the man here, that's what my code of the Latin Kings tells me. I'll take the fall for this. I'll show them all, because I am, after all, the leader. I'll take the fall for this. That's why I confessed.

Well, it seems to me that if your words were sincere or are sincere, you confessed because it was the right thing to do, all along you have thought about your affiliation with the Latin Kings. You yourself Shaun said just a few moments ago to this court, I can't call law enforcement after I watched what I saw. I can't tell on my brothers, my Latin King brothers did this. We don't do that. I confessed because -- not because it was the right thing, but because, you know, I'm the leader, I -- not all of us should go to prison, I'll do it. I'll probably be out five -- ten years. They can't get me anyway. And I'll now hold my rightful

spot with the Latin King brotherhood that I'm the one who took the fall for all the four weaklings under me. The pecking order has now been established, the rest of you are finks and liars and cowards and cheats and I'll let you go home to your families and I'll be the man and I'll take responsibility.

That's not somebody who's confessing out of compassion and thoughtfulness for the family and an understanding of the wrongfulness of his actions. It's someone who's confessing, by your own words, because that's what a Latin King does. I'll take the heat. I'm being thoughtful for my fellow actors. They get to go home to their families. They only want one of our scalps, it will be mine. And now ten months later you found religion.

Now you're disassociating yourself from the Latin Kings because the reality is sinking in. Those guys all not only get to go home, they finked on me. Here I was, doing them all one big favor, being the fall guy here, and they don't even deserve it. That's what you're angry about. You're

angry about the fact that you were going to fall on your sword for people who now don't deserve it because they squealed on you, not because you found religion and you're repentant for what you did to these two other human beings.

And oh yeah, you're facing, as your letter says pointedly, a hell of a lot of time. I think you think it's up to 105 years, if the State does what they ask me to do it's up to 70. That reality has sunk in. It isn't going to be five or ten, Jimminy crickets, and this guy's finked on me, how the hell do I get out of this mess? That's not repentance, that's not introspection, that's not remorse. It's selfish, self-serving, scared, 24-year-old Shaun Matz talking, holy cow, I got screwed, the guys that I'm taking the fall for aren't worth it.

There's nothing in that philosophy or that thinking that has anything to do with remorse for the lives of Mr. Mariano and Mr. Rodriguez. I've looked over my notes from the Salazar sentencing, and it's remarkably comparable to the comments

back to reload, then we're going to come back and kill another person by shooting them in the eye. The public has an absolute right to be protected from people who will not abide by our laws for whatever reasons, and who are willing to take the life of another person with such facility and such ease and act, as I have said, that is not easy. You can make it seem easy.

The public has an absolute right to be protected from predators. The State is absolutely correct, that is what you and Mr. Salazar and Mr. Lynd, Mr. Montana, Mr. Gallegos were, and that you cannot do, sir. That's where the law steps in. How you fight it out amongst yourselves when you're in prison, about loyalty or disloyalty or who took the fall or who pointed fingers, I don't care. That's Latin King business, that's not court business.

I think you are a high risk to reoffend because I don't believe, even though you're remorseful or you express some sort of remorse, the fact is that it is sort of a selfish, self-centered remorse. At this stage

without any sort of rehabilitation, I don't think you're capable of having a real meaningful insight. And without any real introspection and insight about just how awful and wrong this behavior is and the hurt and the cruelty that is inflicted on these families, there can be no real remorse. And without remorse there can be no forgiveness or healing or moving on.

When the court considers the seriousness of these offenses, the character of the defendant and the need to protect the public, I do so with the full intention of shaping a fair, just and appropriate sentence. And when I do that in this case, I conclude that the following sentence is appropriate -- sentences are appropriate. With respect to count 1, first degree reckless homicide as a party to a crime, the court is going to impose 55 years in the Wisconsin state prison system. It's 35 years of initial confinement and 20 years of extended supervision.

The conditions of your extended supervision are you're to have an AODA

assessment and treatment, absolute sobriety, random urine screens. You're to obtain full-time employment. You're to obtain a GED or HSED if you do not have one. You're forbidden from having guns, drugs, drug paraphernalia. You're to abide by all the rules and regulations of the Department of Corrections. You're to have a DNA sample, pay the costs and surcharges associated with this case.

Court's also imposing restitution in the amount of $1,765 to the Rodriguez family, as well as $2,000 reimbursement to the Department of Justice Victim Impact Fund. The costs and surcharges, as well as the restitution, are to be taken out of your prison wages at a rate of 25 percent and paid thereafter over the period of extended supervision.

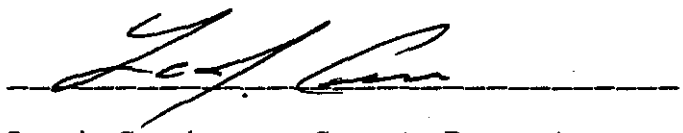
With respect to count 2, the court is going to impose 25 years in the Wisconsin -- strike that, 50 years in the Wisconsin state prison system, that will be consecutive. It's 25 years of initial confinement and 25 years of extended supervision. It's consecutive to count 1.

STATE OF WISCONSIN)

MILWAUKEE COUNTY)

I, Lori J. Cunico, do hereby certify that I am a Registered Professional Reporter, that as such I recorded the foregoing proceedings, later transcribed by me, and that it is true and correct to the best of my abilities.

Dated this 27 day of October, 2004, at Milwaukee, Wisconsin.



Lori Cunico - Court Reporter