UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GARY COHEN, Plaintiff	:	
v.	:	3:99-CV-2566 (EBB)
JEFFREY DUBUC, OFFICER DOUGLAS SENN, and OFFICER MICHAEL McKENNA, Defendants	:	

RULING ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Gary Cohen ("Plaintiff" or "Cohen") brings this civil rights action, pursuant to 42 U.S.C. Section 1983, against Defendants Jeffrey Dubuc, Douglas Senn, and Michael McKenna (collectively "Defendants"). Cohen contends that he was arrested and his automobile searched without probable cause. Defendants assert that they had ample probable cause for both actions and now move for summary judgment on the Complaint.

STATEMENT OF FACTS

The Court sets forth only those facts deemed necessary to an understanding of the issues raised in, and decision rendered on, these Motions. The facts are culled from Plaintiff's Complaint, the parties' moving papers and exhibits thereto, and the Local Rule 9(c) Statements.

Defendant Dubuc is a Connecticut Police Trooper. Defendants

Senn and McKenna are both Westbrook Police Officers. On April 22, 1999, Dubuc was working the evening shift at Troop F when he received a dispatch from the troop directing him to respond to a residential address on Route #1 in Westbrook to investigate a threatening complaint. Upon arrival, Dubuc spoke with the complainant, one Vernon Mitchell. Mitchell explained to Dubuc that he was a student at Westbrook High School, and that he heard a rumor that day indicating that a fellow student named "Gary" was going to shoot up the high school. Mitchell indicated that he had not heard these threats firsthand, but that he had only heard the account as told to him by other students. Mitchell stated that "Gary" was currently employed at the Dari Mart/Taco Bell located on Route #1 in Westbrook. He described "Gary" as a white male with long, brown hair.

Dubuc averred that Mitchells's complaint had special significance at the time it was made, in that it was just two days after the massacre at Columbine which had received national attention and was the source of considerable concern within the national educational community. Inasmuch as Troop F and the Westbrook Police Department had been inundated with calls from parents of students of Westbrook High School, reporting their concern and fear over the rumors reported by Mitchell, Dubuc, based upon his training and experience, believed that any reports of this nature had to be taken very seriously because of the

danger of "copycat" killings.

Based on this information, Dubuc enlisted the aid of Senn and McKenna and the three officers traveled to the Dari Mart/Taco Bell looking for "Gary", in order to further investigate the alleged threats. Upon arrival, the officers were met by two girls, also students at the high school, who reported that they were present at the Dari Mart when Plaintiff made threatening comments. Both stated that they heard Plaintiff make threatening comments about shooting up the school. Upon request, the girls agreed to accompany Dubuc to headquarters to give sworn, written statements concerning what they knew.

While en route to the station, Dubuc was advised that another student had also heard the statements being made. While Dubuc took statements from the two girls at the station, another officer was dispatched to the home of one Savannah Gowdy to get a statement from her.

The comments attributed to "Gary", by now known to be one Gary Cohen, included that "maybe I would not kill them, but I would torture them"; he "had a safe list and, if you are on it, you will not be hurt"; if "he gets a school suspension the school would have hell to pay"; and, "if you are not on the safe list, you will be screwed". See Motion for Summary Judgment, Exhibit A: twenty-police report, including sworn statements of witnesses and Cohen.

According to one of the witnesses, one Desiree DeGrasse, Cohen had noted that there was a school picnic on the up-coming Friday, which would be "convenient". This witness also told Dubuc that Cohen had referred to the two Columbine shooters as his "brothers" and that he could understand their psin and why they did what they did, but not to the same extreme. Rather, he would shoot people in their kneecaps, to torture them.

A friend of Cohen's, who also gave a sworn statement, indicated that he could hear Cohen making these statements to "impress people."

Dubuc averred in his affidavit in support of these motions that, based on the information received from these witnesses, and the public uproar and fear that these threats caused the parents of Westbrook High School students, he believed he had probable cause to arrest Cohen for the crimes of Breach of Peace and Threatening, in violation of Connecticut General Statutes Sections 53a-181 and 53a-62, respectively.

After establishing that Dubuc believed he had probable cause to arrest Cohen, the Defendants all returned to the Dari Mart/Taco Bell to effectuate such arrest. Upon their arrival, one of the witnesses advised the officers that Cohen had just driven by the store in a blue car with dark tinted windows. Dubuc felt it was to the officers' advantage to arrest the suspect out of his home, if possible, to minimize his ability to

obtain weapons or destroy weapons if this was his inclination.

The officers located a blue 1986 Ford LTD with tinted windows shortly thereafter. They stopped the vehicle and determined that Cohen was driving, with two passengers. The passengers, after stating that Cohen had not spoken about hurting anyone, were turned over to their mother.

Once the passengers departed, Dubuc searched Cohen's car incident to the custodial arrest. He found nothing in the vehicle which was a weapon of any kind. The vehicle was then towed from the scene for safekeeping.

At the barracks, Cohen was processed and advised of his constitutional rights. He also elected to make a statement, in which he wrote that he had attention deficit disorder, and when he gets worked up, he does not remember things that he said.

Both charges were dismissed against Plaintiff three months later.

LEGAL ANALYSIS

I. The Standard of Review

In a motion for summary judgment the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See also* Anderson v. Liberty Lobby, 477 U.S. 242, 256 (1986)(plaintiff must present affirmative evidence in order to defeat a properly supported

motion for summary judgment). Although the moving party has the initial burden of establishing that no factual issues exist, "[o]nce that burden is met, the opposing party must set forth specific facts demonstrating that there is a genuine issue for trial." Sylvestre v. United States, 771 F.Supp. 515, 516 (D.Conn. 1990).

If the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof at trial, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322-23. *Accord,* Goenaga v. March of Dimes Birth Defects Foundation, 51 F.3d 14, 18 (2d. Cir. 1995)(movant's burden satisfied by showing if it can point to an absence of evidence to support an essential element of nonmoving party's claim). In this regard, mere assertions and conclusions of the party opposing summary judgment are not enough to defend a well-pleaded motion. Lamontagne v. E.I. DuPont de Nemours & Co., 834 F.Supp 576, 580 (D.Conn. 1993), *aff'd* 41 F.3d 846 (2d Cir. 1994).

The court is mandated to "resolve all ambiguities and draw all inferences in favor of the nonmoving party. . . ." Aldrich

v. Randolph Cent. Sch. Dist., 963 F.2d. 520, 523 (2d Cir.), *cert. denied*, 506 U.S. 965 (1992). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849 (1991). If the nonmoving party submits evidence which is "merely colorable", or is not "significantly probative," summary judgment may be granted. Anderson, 477 U.S. at 249-52 (scintilla of evidence in support of plaintiff's position insufficient; there must be evidence from which a jury could reasonably find in his favor). *See also*, Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000)(same). *Accord* McBride v. City of New Haven et al., 2000 WL 559087 at * 1 (D. Conn., March 30, 2000)(immaterial or minor facts will not prevent summary judgment).

II. The Standard As Applied

Probable cause to arrest exists "when the authorities have knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." Golino v. City of New Haven, 950 F.2d, 864, 870 (2d Cir. 1991) *citing* Dunaway v. New York, 442 U.S 200, 208 n.9 (1979); *see also* Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975)(explaining that probable cause exists when the "facts and circumstances [are] sufficient to warrant a prudent man in believing that the suspect

has committed or was committing an offense.")(citation omitted); State v. Barton, 219 Conn. 529, 548 (1991)(explaining that, under Connecticut law, probable cause "comprises such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred")(internal quotation marks omitted). It is well-established that a law enforcement official has probable cause to arrest if he receives his information from some person, normally the putative victim or an eyewitness. Martinez v. Simonnetti, 202 F.3d 625, 634 (2d Cir. 2000).

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). "The quantum of evidence required to establish probable cause to arrest need not reach the level of evidence necessary to support a conviction ." United States v. Fisher, 702 F.2d 372, 375 (2d Cir. 1983). *See also* Illinois v. Gates, 462 U.S. 213, 243-244 n. 13 (1983)(stating that "[p]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."). Thus, the fact that the charges were later dismissed or an arrestee was subsequently acquitted of the crime for which he was arrested does not

indicate that probable cause was lacking for the arrest. *See* Krause v. Bennett, 887 F.2d 362, 371 (2d Cir. 1989).

In determining whether the necessary quantum of evidence existed to support a finding of probable cause, the court is required to evaluate the totality of the circumstances. Gates, 462 U.S. at 238. In making this determination, a court "must consider those facts available to the officer at the time of arrest and immediately before it." Lowth v. Town of Cheekowaga, 82 F.3d 563, 569 (2d Cir. 1996).

As noted above, eyewitnesses to Cohen's behavior and threats reported: 1) that he might not kill "them", but he would torture "them" by shooting them in their kneecaps; 2) that he has a safe list, and if you are on it, you won't be hurt; 3) if he got a school suspension, the school would have hell to pay [1]/ and 4) if you are not on the safe list, "then you will be screwed". He also claimed to understand his "brothers" at Columbine and that he understood their actions and their pain. Finally, he asserted that the school picnic to be held on April 23, that Friday, would be "convenient." Three independent witnesses gave the police sworn statements to these threats and the Police Department was inundated with calls from frightened parents who had heard of them from their children.

Here, it is beyond cavil that Dubuc, or either of his co-

[1]/ Cohen was indeed given an in-school suspension on April 22, 1999.

defendants, had probable cause to arrest Cohen on these threatening, dangerous statements and to possibly avoid a tragic situation. The Court takes judicial notice of the fact that, following Columbine, the schools and police nationwide were afraid of, and attempting to prepare for, "copycat" killings. Knowing that Cohen had been given an in-school suspension, an event which Cohen had stated would trigger a potential horrific event, Dubuc had ample probable cause to arrest Cohen. Even after his arrest, Cohen acknowledged that he suffered from attention deficit disorder and that "there are sometimes when I get worked up that I forget what I said." His own friend, who also gave a sworn statement, stated that "Gary talks too much" and that, when giving him a ride home, Cohen had apologized for making the remarks. The friend also stated that "he would say these things to impress people."

Under these circumstances as they faced the Defendants, the necessary quantum of evidence existed to support a finding of probable cause, under the totality of the circumstances. The facts available to the officers at the time of arrest and immediately before it far surpasses the test of Gates. Under the totality of the circumstances, these officers would likely have been in dereliction of their duties had they **not** taken Cohen into custody. Accordingly, this Court finds that, under all the precedential law set forth above, there was ample probable cause

for the arrest of Cohen by these officers.

Plaintiff also claims that the Defendants violated the Fourth Amendment by making a warrantless search of his car. "A warrantless search . . . is per se unreasonable subject only to a few specifically established well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967)(citation omitted)). Accord State v. Miller, 227 Conn. 363, 383 (1993); State v. Lewis, 220 Conn. 602, 609 (1991). The state bears the burden of proving that an exception to the warrant requirement applied. Mincey v. Arizona, 437 U.S. 385, 390-91 (1978); States v. Blades, 225 Conn. 609, 618 (1993); State v. Szepanski, 57 Conn.App. 484, 487-88 (2000).

"One of those exceptions is a search incident to a lawful arrest. It is an established rule that a properly conducted warrantless search incident to a lawful arrest is itself lawful. State v. Cobuzzi, 161 Conn. 371, 373 (1971) cert. denied, 404 U.S. 1017 (1972); State v. Collins, 150 Conn. 488, 492 (1963)." State v. Hedge, 59 Conn. App. 272, 277 (2000), *quoting* State v. Velasco, 248 Conn. 183, 189 (1999). "Thus, if the defendant's arrest was lawful, the subsequent warrantless search . . . also was lawful". Velasco, 248 Conn at 189.

Inasmuch as this Court has found that there was probable cause to arrest Plaintiff, concomitantly, the officers acted reasonably in searching the car for any kinds of weapons or

bombs. There exists no violation of Plaintiff's Fourth Amendment rights as to the warrantless search of his car, following his lawful arrest.

In any event, these officers are entitled to qualified immunity based upon their reasonable actions. The qualified or "good faith" immunity enjoyed by police officers shields them from personal liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), or insofar as it was objectively reasonable for them to believe that their acts did not violate those rights. *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987)". Golino, 950 F.2d at 870. Faced with the exigent circumstances of this case, the Court finds that probable cause existed and that the acts of the officers involved were more than eminently reasonable. As noted above, to ignore the Plaintiff's statements and the threat of horrific actions would, in all likelihood, be noted as a dereliction of duties by these officers had they not intervened by interviewing independent witnesses who had sworn under oath as to Cohen's threats and, following this, to arrest Cohen. Exigent circumstances existed and it was more than reasonable to act with all due haste, which the officers did.

In sum, in order to be entitled to summary judgment on the

defense of qualified immunity, the officers must have adduced sufficient facts that no reasonable jury, looking to the evidence, and drawing all inferences, most favorable to the Plaintiff, could conclude that it was objectively unreasonable for the officers to believe that they were acting in a fashion that did not clearly violate an established federally protected right. Robinson v. Via, 821 F.2d 913, 921 (2d Cir. 1987). Defendants have met this burden; each is entitled to the defense of qualified immunity.

CONCLUSION

Plaintiff has failed to set forth any genuine issues of material fact on which he would bear the burden at trial. His claims of violations of the Fourth Amendment to the Constitution are hereby rejected by this Court. Accordingly, the Motions for Summary Judgment [Doc. Nos. 24 and 27] are hereby GRANTED. The Clerk is directed to close this case.

SO ORDERED

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ELLEN BREE BURNS
SENIOR UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut this ___ day of November, 2000.