

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2012

Heard: October 2, 2012

Decided: January 3, 2013

Docket No. 11-2846-cv

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1 John Swartz, Judy Mayton-Swartz,  
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3 Plaintiffs-Appellants,  
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5 v.  
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7 Richard Insogna, Kevin Collins,  
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9 Defendants-Appellees.  
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11  
12 Before: NEWMAN, LYNCH, and LOHIER, Circuit Judges.  
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14 Appeal from the July 8, 2011, judgment of the United States  
15 District Court for the Northern District of New York (David N. Hurd,  
16 District Judge), dismissing a suit seeking damages for the seizure of  
17 two persons ordered to return to an automobile, a disorderly conduct  
18 arrest, and an alleged malicious prosecution, all claimed to have been  
19 precipitated by an automobile passenger's "giving the finger" to a  
20 police officer.

21 Vacated and remanded.

22 Elmer Robert Keach, III, Law Office of  
23 Elmer Robert Keach, III, PC, Amsterdam,  
24 N.Y., for Appellants.  
25

26 Catherine Ann Barber, Murphy, Burns,  
27 Barber & Murphy, LLP, Albany, N.Y.  
28 (Thomas K. Murphy, Murphy, Burns,  
29 Barber & Murphy, LLP, Albany, N.Y. on  
30 the brief), for Appellees.  
31  
32

1 JON O. NEWMAN, Circuit Judge:

2 An irate automobile passenger's act of "giving the finger," a  
3 gesture of insult known for centuries,<sup>1</sup> to a policeman has led to a  
4 seizure of two persons ordered to return to an automobile, an arrest  
5 for disorderly conduct, a civil rights suit, and now this appeal.  
6 Plaintiffs-Appellants John Swartz ("John") and his wife, Judy Mayton-  
7 Swartz ("Judy"), appeal the July 8, 2011, judgment of the United  
8 States District Court for the Northern District of New York (David N.  
9 Hurd, District Judge) granting summary judgment to Defendants-  
10 Appellees Richard Insogna, a St. Johnsville, New York, police officer,  
11 and Kevin Collins, an officer with the Montgomery, New York, Sheriff's  
12 Department.

13 Accepting, as we must at this stage of the litigation, the  
14 Plaintiffs' version of the facts, we vacate the judgment and remand  
15 for further proceedings.

#### 16 Background

17 In his deposition John gave the following account of the  
18 incident. In May 2006, he and Judy were driving through the Village  
19 of St. Johnsville on their way to the home of Judy's son. Judy was

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<sup>1</sup>See Bad Frog Brewery, Inc. v. New York State Liquor Authority, 134 F.3d 87, 91 n.1 (2d Cir. 1998) (reporting the use of the gesture by Diogenes to insult Demosthenes). Even earlier, Strepsiades was portrayed by Aristophanes as extending the middle finger to insult Aristotle. See Aristophanes, The Clouds (W. Arrowsmith, trans., Running Press (1962)). Possibly the first recorded use of the gesture in the United States occurred in 1886 when a joint baseball team photograph of the Boston Beaneaters and the New York Giants showed a Boston pitcher giving the finger to the Giants. See Ira P. Robbins, Digitus Impudicus: The Middle Finger and the Law, 41 U.C. Davis L. Rev. 1403, 1415 (2008).

1 driving; John was in the passenger seat. At an intersection, John saw  
2 a local police officer, Defendant Insogna, in a police car using a  
3 radar device, of which John became aware because he had a radar  
4 detector. John expressed his displeasure at what the officer was  
5 doing by reaching his right arm outside the passenger side window and  
6 extending his middle finger over the car's roof. The Plaintiffs, who  
7 were not speeding or committing any other traffic violation, continued  
8 to the home of Judy's son. Upon reaching their destination on Monroe  
9 Street, the Plaintiffs got out of the car and saw a police car with  
10 its lights flashing approaching from the corner of the street they  
11 were on, ultimately stopping behind Judy's car. When John walked to  
12 the trunk of the car, Insogna ordered him and Judy to get back in the  
13 car. John initially refused, telling Insogna that he had not been  
14 driving the car. Insogna again told John to get back in the car,  
15 stating that this was a traffic stop. Judy then urged John to reenter  
16 the car, and they both did so.

17 Insogna then asked to see Judy's license and registration. John  
18 then told her not to show the officer anything, prompting Insogna to  
19 say, "Shut your mouth, your ass is in enough trouble." Insogna then  
20 collected Judy's license and registration, returned to his police car  
21 to check the documents, and called for backup. Three other officers  
22 soon appeared.

23 Insogna returned to Judy's car, gave her back the documents, and  
24 told the Plaintiffs they could go. John then got out of the car and

1 asked if he could speak to Insogna, saying "I'd like to speak to you  
2 man to man." As he started walking toward Insogna, who was more than  
3 20 feet away, three other officers stepped in front of him. John  
4 stopped, walked away from the officers, and said to himself in a voice  
5 apparently too low for his words to be understood, "I feel like an  
6 ass." One of the other officers asked John what he had said, and John  
7 repeated his remark loud enough to be heard. At that point Defendant  
8 Collins said, "That does it, you're under arrest," but did not say for  
9 what.

10 John was then handcuffed, placed in a police car, and driven to  
11 the police station, where he was given an appearance ticket and  
12 released. At the station, he was told he had been arrested for  
13 disorderly conduct. Insogna subsequently swore out a complaint, which  
14 he filed in the local criminal court, charging Swartz with violation  
15 of New York's disorderly conduct statute. Under New York law, such a  
16 complaint "[s]erves as a basis . . . for the commencement of a  
17 criminal action." N.Y. Crim. Proc. Law § 100.10(1). After he returned  
18 home, John retained an attorney. The charge remained pending for  
19 several years, during which John made three court appearances. The  
20 charge was ultimately dismissed on speedy trial grounds.

21 The officers gave a different account. In his deposition,  
22 Insogna said that after he saw John give him the finger, he decided to  
23 follow the car "to initiate a stop on it." As reasons he stated: (1)  
24 John's gesture "appeared to me he was trying to get my attention for

1 some reason," (2) "I thought that maybe there could be a problem in  
2 the car. I just wanted to assure the safety of the passengers," and  
3 (3) "I was concerned for the female driver, if there was a domestic  
4 dispute."

5 Insogna said he followed the car and attempted to have it stop,  
6 but it continued to Monroe Street and did not stop until he drove up  
7 behind it. At that point John got out of the car, ran at Insogna,  
8 and called him various vulgar names. After John and Judy got back  
9 into their car, Insogna obtained and checked Judy's license and  
10 registration, and then called for backup "for my safety." Other  
11 officers arrived. One of them, Officer Cuddy, approached John in the  
12 car and identified himself after John asked who he was. John started  
13 yelling and described Insogna to Cuddy with some of the vulgar terms  
14 he had previously used. After Insogna told John and Judy they were  
15 free to go, John got out of the car and told Insogna he wanted to talk  
16 to him "man to man." Insogna told him that would not be a good idea,  
17 at which point John walked away shouting that he, John, "felt like an  
18 asshole." At that point, Insogna arrested John.

19 Collins in his deposition essentially confirmed Insogna's account  
20 of the episode preceding the arrest.

21 The District Court granted the Defendants' motion for summary  
22 judgment and dismissed the Plaintiffs' suit. The District Court,  
23 accepting Insogna's third reason for the automobile stop, ruled that  
24 the stop was legal because Swartz's "odd and aggressive behavior  
25 directed at a police officer created a reasonable suspicion that

1 Swartz was either engaged in or about to be engaged in criminal  
2 activity, such as violence against the driver of the vehicle." The  
3 Court next ruled that the Defendants were entitled to qualified  
4 immunity on the false arrest claim because "an objectively reasonable  
5 officer could have believed that there was probable cause for a  
6 disorderly conduct arrest." Finally, the Court ruled that the fact  
7 that John had to make three court appearances did not amount to a  
8 "post-arraignment seizure," a necessary component of a malicious  
9 prosecution claim.

## 10 Discussion

### 11 I. Legal Standards

12 This Court reviews de novo a district court's order for summary  
13 judgment, see Wachovia Bank, National Association v. VCG Special  
14 Opportunities Master Fund, Ltd., 661 F.3d 164, 171 (2d Cir. 2011), the  
15 standards for which are well settled, see Celotex Corp. v. Catrett,  
16 477 U.S. 317, 322 (1986); Wachovia Bank, National Association, 661  
17 F.3d at 171; John Street Leasehold LLC v. FDIC, 196 F.3d 379, 382 (2d  
18 Cir. 1999), including the principle, especially pertinent to this  
19 appeal, that the facts are to be viewed on appeal in the light most  
20 favorable to the non-moving party, see, e.g., Jaegly v. Couch, 439  
21 F.3d 149, 151 (2d Cir. 2006). The standards for qualified immunity  
22 are also well settled. "[Q]ualified immunity protects government  
23 officials from liability for civil damages insofar as their conduct  
24 does not violate clearly established statutory or constitutional  
25 rights of which a reasonable person would have known." Pearson v.  
26 Callahan, 555 U.S. 223, 231 (2009) (internal citations and quotation

1 marks omitted). "A police officer who has an objectively reasonable  
2 belief that his actions are lawful is entitled to qualified immunity."  
3 Okin v. Village of Cornwall-on-Hudson Police Department, 577 F.3d 415,  
4 433 (2d Cir. 2009).

## 5 II. Substantive Analysis

6 The motor vehicle stop. Initially we note that there is a  
7 question whether a motor vehicle stop occurred. On a view of the  
8 facts favorable to the Plaintiffs, appropriate for assessing the  
9 Defendants' motion for summary judgment, Judy stopped the car  
10 voluntarily upon arriving at her son's home. Moments later a police  
11 car pulled up behind her car. On the Plaintiffs' view of the  
12 evidence, the police did not stop the car. They contend they got out  
13 of the car after the car had stopped and were then told by Insogna to  
14 get back into the car, which they did. The instruction to reenter the  
15 car might be considered a component of a motor vehicle stop because in  
16 a typical automobile stop occupants would be told to remain in their  
17 car. But even if an automobile stop did not occur (although we note  
18 that Insogna insists that he did cause Judy's car to stop), the  
19 instruction to reenter the car was a sufficient interference with  
20 liberty to constitute a Fourth Amendment seizure. See Terry v. Ohio,  
21 392 U.S. 1, 16 (1968) ("[W]henever a police officer accosts an  
22 individual and restrains his freedom to walk away, he has 'seized'  
23 that person."); cf. Whren v. United States, 517 U.S. 806, 809-10  
24 (1996) ("Temporary detention of individuals during the stop of an  
25 automobile by the police, even if only for a brief period and for a  
26 limited purpose, constitutes a 'seizure' of 'persons' within the

1 meaning of [the Fourth Amendment]."). An officer "may not lawfully  
2 order someone to stop unless the officer reasonably suspects the  
3 person of being engaged in illegal activity." United States v.  
4 Jenkins, 452 F.3d 207, 212 (2d Cir. 2006) (internal quotation marks  
5 omitted).

6 The issue then becomes whether, on the Plaintiffs' version of the  
7 facts, Insogna had reasonable suspicion that criminal activity or a  
8 traffic violation was afoot. The only act Insogna had observed prior  
9 to the stop that prompted him to initiate the stop was John's giving-  
10 the-finger gesture. Insogna acknowledged in his deposition that he  
11 had not observed any indication of a motor vehicle violation. He  
12 stated, somewhat inconsistently, that he thought John "was trying to  
13 get my attention for some reason" and that he "was concerned for the  
14 female driver."

15 Perhaps there is a police officer somewhere who would interpret  
16 an automobile passenger's giving him the finger as a signal of  
17 distress, creating a suspicion that something occurring in the  
18 automobile warranted investigation. And perhaps that interpretation  
19 is what prompted Insogna to act, as he claims. But the nearly  
20 universal recognition that this gesture is an insult deprives such an  
21 interpretation of reasonableness. This ancient gesture of insult is  
22 not the basis for a reasonable suspicion of a traffic violation or  
23 impending criminal activity. Surely no passenger planning some  
24 wrongful conduct toward another occupant of an automobile would call  
25 attention to himself by giving the finger to a police officer. And if  
26 there might be an automobile passenger somewhere who will give the



1 finger to a police officer as an ill-advised signal for help, it is  
2 far more consistent with all citizens' protection against improper  
3 police apprehension to leave that highly unlikely signal without a  
4 response than to lend judicial approval to the stopping of every  
5 vehicle from which a passenger makes that gesture.

6 On the Plaintiffs' version of the facts, the stop was not lawful,  
7 and it was error to grant the Defendants summary judgment on the  
8 Plaintiffs' claim concerning the stop. Cf. Sandul v. Larion, 119 F.3d  
9 1250, 1254-57 (6th Cir. 1997) (vacating grant of summary judgment to  
10 police officers in suit by automobile passenger arrested for  
11 disorderly conduct for shouting obscenity and giving the finger to  
12 police officer); Cook v. Board of County Commissioners, 966 F. Supp.  
13 1049, 1052 (D. Kan. 1997) (denying motion to dismiss suit by  
14 automobile passenger arrested for disorderly conduct for giving the  
15 finger to a group of protesters, which included to police officer).  
16 Nor were the Defendants entitled to qualified immunity on this claim  
17 because a reasonable police officer would not have believed he was  
18 entitled to initiate the law enforcement process in response to giving  
19 the finger. Cf. Sandul, 119 F.3d at 1256-57; Cook, 966 F. Supp. at  
20 1052.

21 The disorderly conduct arrest. On the Plaintiffs' version of the  
22 facts, John's conduct preceding his arrest for disorderly conduct  
23 consisted only of the followings events. From a distance of more than  
24 20 feet, he stated in a normal voice that he wanted to speak to

1 Insogna "man to man"; when other officers stood in his way, he  
2 retreated and said in a tone too low for his words to be understood by  
3 the officers next to him, "I feel like an ass"; in response to an  
4 officer's request to repeat what he had said, John did so; Collins  
5 then said, "That does it, you're under arrest."

6 A police officer has probable cause for an arrest when he has  
7 "knowledge or reasonably trustworthy information of facts and  
8 circumstances that are sufficient to warrant a person of reasonable  
9 caution in the belief that the person to be arrested has committed or  
10 is committing a crime," Weyant v. Okst, 101 F.3d 845, 852 (2d Cir.  
11 1996), and is entitled to qualified immunity where he "has an  
12 objectively reasonable belief that his actions are lawful," Okin, 577  
13 F.3d at 433.

14 Even with the wide range of conduct subsumed under New York's  
15 expansive definition of disorderly conduct,<sup>2</sup> John's conduct, on the

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<sup>2</sup> A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or

1 Plaintiffs' version of the facts, could not create a reasonable  
2 suspicion that a disorderly conduct violation had been or was being  
3 committed. Neither Collins, whom John says arrested him, nor Insogna,  
4 whose report says he made the arrest, had observed any disruptive  
5 conduct, any threatening conduct, any shouting, or anything that  
6 risked a public disturbance. Whether or not giving the finger is  
7 properly considered an obscene gesture, neither Collins, who had not  
8 observed the gesture, nor Insogna, who had observed it and was likely  
9 piqued by having seen it, makes any claim on appeal that the gesture  
10 was disorderly conduct. Indeed, such a gesture alone cannot establish  
11 probable cause to believe a disorderly conduct violation has occurred.  
12 "The disorderly conduct statute at issue here does not circumscribe  
13 pure speech directed at an individual. Rather, it is directed at  
14 words and utterances coupled with an intent to create a risk of public  
15 disorder . . . ." People v. Tichenor, 89 N.Y.2d 769, 775 (1997)  
16 (citations omitted). On the Plaintiffs' version, probable cause did  
17 not exist for an arrest for disorderly conduct. And because an

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5. He obstructs vehicular or pedestrian traffic; or

6. He congregates with other persons in a public place and  
refuses to comply with a lawful order of the police to disperse;  
or

7. He creates a hazardous or physically offensive condition by  
any act which serves no legitimate purpose.

N.Y. Penal Law § 240.20.

1 objectively reasonable police officer would not have believed that  
2 probable cause existed, neither Defendant was entitled to the defense  
3 of qualified immunity on a motion for summary judgment. Of course,  
4 the defense of qualified immunity and the lawfulness of the arrest  
5 itself will appropriately be in issue at trial, where both versions of  
6 the episode will be presented.

7 The malicious prosecution claim. The elements of a malicious  
8 prosecution claim under section 1983 are derived from applicable state  
9 law. See Conway v. Village of Mount Kisco, 750 F.2d 205, 214 (2d Cir.  
10 1984). We have stated these elements, under New York law, to be (1)  
11 commencement of a criminal proceeding, (2) favorable termination of  
12 the proceeding, (3) lack of probable cause, and (4) institution of the  
13 proceedings with actual malice. See Jocks v. Tavernier, 316 F.3d 128,  
14 136 (2d Cir. 2003); Murphy v. Lynn, 118 F.3d 938, 947 (2d Cir. 1997).  
15 Additionally, we have said, to be actionable under section 1983 there  
16 must be a post-arraignment seizure, the claim being grounded  
17 ultimately on the Fourth Amendment's prohibition of unreasonable  
18 seizures. See Jocks, 316 F.3d at 136.

19 We have consistently held that a post-arraignment defendant who  
20 is "obligated to appear in court in connection with [criminal] charges  
21 whenever his attendance [i]s required" suffers a Fourth Amendment  
22 deprivation of liberty. See Murphy, 118 F.3d at 947; Jocks, 316 F.3d  
23 at 136 (concluding that "the requirements of attending criminal  
24 proceedings and obeying the conditions of bail" constitute a post-  
25 arraignment seizure); Rohman v. New York City Transit Authority, 215  
26 F.3d 208, 215-16 (2d Cir. 2000) (finding Fourth Amendment implicated

1 where plaintiff "alleged that he was required, as a condition of his  
2 post-arraignment release, to return to court on at least five  
3 occasions before the charges against him were ultimately dropped," and  
4 where he was obliged by New York statute to "render himself at all  
5 times amenable to the orders and processes of the court") (internal  
6 quotation marks omitted). When Insogna swore out a complaint against  
7 John and filed it in a criminal court, he commenced a criminal action.  
8 See N.Y. Crim. Proc. Law §§ 100.05, 100.10. He thus put in motion  
9 proceedings that rendered the defendant at all times subject to the  
10 orders of the court, see § 510.40(2), and foreseeably required him to  
11 incur the expense of a lawyer and the inconvenience and perhaps  
12 expense of multiple court appearances.

13 The District Court relied on dictum in Burg v. Gosselin, 591 F.3d  
14 95, 98 (2d Cir. 2010), to dismiss the malicious prosecution claim.  
15 However, there was no claim for malicious prosecution in Burg, see id.  
16 at 96 n.3, the plaintiff having sought damages only for the issuance  
17 of a summons, see id. at 96. We ruled "that the issuance of a pre-  
18 arraignment, non-felony summons requiring a later court appearance,  
19 without further restrictions, does not constitute a Fourth Amendment  
20 seizure." Id. at 98. The plaintiff in Burg was required to appear in  
21 court only once. See id. We observed that "the number of [court]  
22 appearances may bear upon whether there was a seizure," adding in  
23 dictum, however, that "it is hard to see how multiple appearances  
24 required by a court, or for the convenience of the person answering  
25 the summons, can be attributed to the conduct of the officer who  
26 issues it." Id. Burg's dictum is questionable unless the multiple

1       appearances were for the arrestee's convenience, but, in any event, we  
2       decline to apply that dictum to the different context of a plaintiff  
3       who was required to appear in court in connection with criminal  
4       proceedings initiated by the defendant police officer.

5               Dismissal of the claim for malicious prosecution on motion for  
6       summary judgment was error.

7                               Conclusion

8               We vacate the judgment dismissing all three of the Plaintiffs'  
9       claims and remand for further proceedings.