

FILE COPY

Robert John
Law Office of Robert John
P.O. Box 73570
Fairbanks, AK 99707
907-456-6056/907-456-6057 (FAX)
Attorney for Yong H. Yi



IN THE SUPREME COURT OF THE STATE OF ALASKA

YONG H. YI ,)
)
)
Appellant,)
vs.)
)
HARRIS S. YANG, SHARON YANG,)
MAX ARTHUR LAMOUREAU, Y & I)
CORPORATION, OFFICER LAWRENCE)
PAYTON MERIDETH and the CITY)
OF FAIRBANKS,)
Appellees.)



Supreme Court Case No. S-13427
Superior Court Case No 4FA-04-2761 CI

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DECEMBER 8, 2008 JUDGMENT OF THE
SUPERIOR COURT, FOURTH JUDICIAL DISTRICT AT FAIRBANKS
THE HONORABLE RANDY M. OLSEN, PRESIDING

LAW OFFICE OF ROBERT JOHN

By: 
Robert John
Alaska Bar No. 8911069
Attorney for Yong H. Yi

Filed in the Supreme Court of
The State of Alaska, this 18
day of May, 2011.

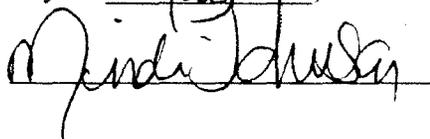
, Deputy Clerk

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

CODES AND STATUES RELIED UPON iii

ARGUMENT 1

 I. The Evidence Clearly Establishes That Max Lamoureux Did Not Make A
 Citizen’s Arrest, And Therefore, Officer Merideth Did Not Have The Authority To
 Arrest Yong Yi Without A Warrant..... 1

 II. Officer Merideth Is Not Entitled To Qualified Immunity..... 4

 A. Section 1983 Claim Against Officer Merideth..... 4

 B. The State-Law Tort Claim..... 7

 III. The City Of Fairbanks Is Not Entitled To Immunity..... 8

CONCLUSION 11

CERTIFICATE OF TYPEFACE AND POINT SIZE 12

TABLE OF AUTHORITIES

Cases

Arpin v. Santa Clara Valley Transportation Agency, 261 F.3d 912 (9th Cir.2001)..... 1
Clabaugh v. Bottcher, 545 P.2d 172 (Alaska 1976) 5
Estate of Logusak v. City of Togiak, 185 P.3d 103 (Alaska 2008) 8
Hill v. Levy, 256 P.2d 622 (Cal. App. 1953)..... 2
Jackson v. Superior Court, 219 P.2d 879 (Cal. App. 1950)..... 2, 3
Johanson v. Dep't of Motor Vehicles, 43 Cal. Rptr.2d 42 (Cal. App. 1995) 4
King v. Massarweh, 782 F.2d 825 (9th Cir. 1986) 11
Legge v. Greig, 880 P.2d 606 (Alaska 1994)..... 7
Lillegraven v. Tengs, 375 P.2d 139 (Alaska 1962) 7
Lindsay v. State, 698 P.2d 659 (Alaska App. 1985)..... 4
Mitchell v. Forsyth, 472 U.S. 511 (1985) 5
Ogulin v. Jeffries, 263 P.2d 75 (Cal. App. 1953) 2
Prentzel v. State, 169 P.3d 573 (Alaska 2007)..... 4
State v. Morse, 252 A.2d 723 (N.J. 1969) 7
Stephan v. State, 711 P.2d 1156 (Alaska 1985)..... 5
Thorne v. Dept. of Public Safety, 774 P.2d 1326 (Alaska 1989) 5
Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995)..... 5

Statutes

42 USC §1983 4, 8
AS 12.25.010..... 1
AS 12.25.030..... 1, 4
AS 12.25.160..... 3

Other Authorities

5 Am. Jur.2d Arrest §55 (1995)..... 2

CODES AND STATUES RELIED UPON

TITLE 42--THE PUBLIC HEALTH AND WELFARE CHAPTER 21--CIVIL RIGHTS SUBCHAPTER I--GENERALLY

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

AS 12.25.010. Persons Authorized to Arrest.

An arrest may be made by a peace officer or by a private person.

AS 12.25.030. Grounds For Arrest By Private Person or Peace Officer Without Warrant.

(a) A private person or a peace officer without a warrant may arrest a person

(1) for a crime committed or attempted in the presence of the person making the arrest;

(2) when the person has committed a felony, although not in the presence of the person making the arrest;

(3) when a felony has in fact been committed, and the person making the arrest has reasonable cause for believing the person to have committed it.

(b) In addition to the authority granted by (a) of this section, a peace officer

(1) shall make an arrest under the circumstances described in AS 18.65.530;

(2) without a warrant may arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer,

(A) committed a crime involving domestic violence, whether the crime is a felony or a misdemeanor; in this subparagraph, "crime involving domestic violence" has the meaning given in AS 18.66.990 ;

(B) committed the crime of violating a protective order in violation of AS 11.56.740 ; or

(C) violated a condition of release imposed under AS 12.30.025 or 12.30.027;

(3) without a warrant may arrest a person when the peace officer has reasonable cause for believing that the person has

(A) committed a crime under or violated conditions imposed as part of the person's release before trial on misdemeanor charges brought under AS 11.41.270 ;

(B) violated AS 04.16.050 or an ordinance with similar elements; however, unless there is a lawful reason for further detention, a person who is under the age of 18 and who has

been arrested for violating AS 04.16.050 or an ordinance with similar elements shall be cited for the offense and released to the person's parent, guardian, or legal custodian; or (C) violated conditions imposed as part of the person's release before trial on felony charges brought under AS 11.41.410 - 11.41.458.

(c) [Repealed, Sec. 16 ch 61 SLA 1982].

(d) [Repealed, Sec. 72 ch 64 SLA 1996].

AS 12.25.160. Arrest Defined.

Arrest is the taking of a person into custody in order that the person may be held to answer for the commission of a crime.

ARGUMENT

I. The Evidence Clearly Establishes That Max Lamoureaux Did Not Make A Citizen's Arrest, And Therefore, Officer Merideth Did Not Have The Authority To Arrest Yong Yi Without A Warrant.

In its brief, the City of Fairbanks asserts that Max Lamoureaux arrested Yong Yi pursuant to Alaska's citizen arrest statute.¹ The City further asserts that Lamoureaux had an implied intent to arrest Yi -- that the intent to arrest was "implied from the citizen's act of summoning the officer, reporting the offense, and pointing out the suspect"² -- and that there was no unnecessary delay in effectuating the citizen's arrest. Thus, according to the City, Lamoureaux performed a successful citizen's arrest.

Contrary to the City's assertion, Lamoureaux did not have the requisite intent to arrest Yi, let alone the implied intent. Lamoureaux did not engage in substantial action to further the arrest.³ Though Lamoureaux did not have to physically confront Yi,⁴ Lamoureaux should have taken some action towards apprehending Yi. This requirement can be satisfied by taking action including verbally confronting the offender,⁵ or watching and following the offender until custodial arrest by the police.⁶ Instead of proceeding with either of these actions, Lamoureaux exited the vehicle he was driving, and proceeded to enter one of the rooms in the hotel. [Exc. 248]

¹ See AS 12.25.010; AS 12.25.030.

² Brief of Appellees at 13 (citing Arpin v. Santa Clara Valley Transportation Agency, 261 F.3d 912, 920 (9th Cir.2001)).

³ See Johnson, 176 Cal. Rptr. at 686 (finding delegated citizen's arrest legal where citizen witnessed the offense, followed the offender, and then reported the offense and pointed out the offender's whereabouts to the police).

⁴ See California v. Sjosten, 68 Cal. Rptr. 832, 836 (1968).

⁵ See Padilla v. Meese, 229 Cal. Rptr. 310, 311 (1986).

⁶ See Johnson, 176 Cal. Rptr. at 686.

After Lamoureaux entered the hotel room, he called the police. [Exc.248] Lamoureaux simply reported Yi's actions to the police and left the police to act independently, thus invalidating a citizen's arrest. Lamoureaux was not focused on the arrest of Yi from start to finish, and took no substantial action to further the arrest. Accordingly, Lamoureaux did not have the requisite intent to arrest Yi such that the citizen's arrest of Yi was valid.

The citizen's arrest was also invalid because the warrantless misdemeanor arrest of Yi was made after unnecessary delay.⁷ In its brief, the City asserts that there was no delay in making the citizen's arrest other than the time it took the officers to complete their on-scene investigation. Delay after witnessing a misdemeanor for purposes unrelated to making an arrest invalidates the power to arrest without a warrant.⁸ Though a delay by a citizen making an arrest to seek and wait for assistance does not invalidate an otherwise legal citizen's arrest,⁹ the citizen's attention must be focused solely on making the arrest throughout the delay.¹⁰

⁷ See Herrin v. State, 449 P.2d 674, 677-78 (Alaska 1969) ("In order to justify a delay, there should be a continued attempt on the part of the officer or person apprehending the offender to make the arrest; he cannot delay for any purpose which is foreign to the accomplishment of the arrest.") (quoting Jackson v. Superior Court, 219 P.2d 879, 882 (Cal. App. 1950)); see also 5 Am. Jur.2d Arrest §55 (1995) ("The arrest must be made at the time of the offense, or some part of it, is being committed, or within a prompt and reasonable time after its commission, or upon fresh and immediate pursuit of the offender.").

⁸ See Herrin, 449 P.2d at 677-78.

⁹ See, e.g., Hill v. Levy, 256 P.2d 622, 624 (Cal. App. 1953) (finding short delay reasonable during which the arresting citizen confronted and argued with the offender, sought help from an uncooperative hotel manager, and then sought help from the police); Ogulin v. Jeffries, 263 P.2d 75, 77-78 (Cal. App. 1953).

¹⁰ See Herrin, 449 P.2d at 678.

The delay prohibition also forbids a citizen from going about business unrelated to the arrest before the arrest is complete.¹¹ For a delegated citizen's arrest to be valid, the citizen must remain focused on accomplishing the arrest even after seeking and receiving the help of the police.¹² Applying these principles to this case, it is clear that Lamoureux's citizen's arrest was invalid.¹³ The trial court accordingly erred when it failed to address the validity of the citizen's arrest.

Lamoureux was never focused on arresting the Yis, let alone from the time he observed their actions. In addition, the unambiguous notations on the bottom of the citizen's arrest report indicate that Lamoureux did not even sign a citizen's arrest report until nearly four hours after the incident. [Exc. 78-84] However, citing to the ambiguous deposition testimony of Officer Merideth and Lamoureux, the City asserts that Merideth and Lamoureux confirmed that the citizen's arrest report was signed contemporaneously with Yi's arrest. Regardless, the fact that Lamoureux eventually signed a citizen's arrest form does not automatically turn him into an "arresting citizen" because Alaska law defines "arrest" as "the taking of a person into custody in order that the person may be held to answer for the commission of a crime."¹⁴ Alaska courts have strictly interpreted

¹¹ Cf. Herrin, 449 P.2d at 677-78 ("In order to justify a delay, there should be a continued attempt on the part of the officer or person apprehending the offender to make the arrest; he cannot delay for any purpose which is foreign to the accomplishment of the arrest.") (quoting Jackson v. Superior Court, 219 P.2d 879, 882 (Cal. App. 1950)).

¹² See Sjosten, 68 Cal. Rptr. at 834-35 (finding delegated citizen's arrest legal where citizen, after calling the police, continued to watch the offender until the police took physical custody of the offender).

¹³ See Green, 137 Cal. Rptr. at 371.

¹⁴ AS 12.25.160.

this statute,¹⁵ and should find that a citizen does not “initiate” an arrest without taking steps towards placing the suspect into custody. Most likely, citizen’s arrest forms are used simply for police liability and record-keeping purposes.¹⁶

Lamoureux’s citizen’s arrest of the Yis was unnecessarily delayed, thus invalidating the warrantless arrest.

In this case, the facts taken in the light most favorable to Yi show that because Lamoureux’s citizen’s arrest was not valid, Officer Merideth violated Yi’s constitutional right to be free from warrantless arrests for minor criminal offenses committed outside the officer’s presence.¹⁷

II. Officer Merideth Is Not Entitled To Qualified Immunity

A. Section 1983 Claim Against Officer Merideth

The City asserts that Officer Merideth is immune from Yi’s claim that Officer Merideth’s actions violated 42 USC §1983. However, it is clear that not only did Officer Merideth fail to comply with AS 12.25.030, but also he did not have probable cause to think Yi was committing a crime because Officer Merideth did not witness Yi’s alleged actions.¹⁸ The City asserts that Officer Merideth’s investigation after-the-fact established probable cause for Yi’s arrest, including the interviews of Max Lamoureux and other witnesses. But the City fails to recognize that at the pivotal moments of the investigation,

¹⁵ See Lindsay v. State, 698 P.2d 659, 663 (Alaska App. 1985).

¹⁶ See Johanson v. Dep’t of Motor Vehicles, 43 Cal. Rptr.2d 42, 47 (Cal. App. 1995) (finding citizen’s arrest form did not constitute dispositive evidence of the charge for which offender was arrested).

¹⁷ Cf. Prentzel v. State, 169 P.3d 573, 589 (Alaska 2007).

¹⁸ See id.

Officer Merideth did not turn on the micro cassette recorder available on his person.

[Exc. 204]

As the Fourth Circuit has observed:

To draw an adverse inference from the absence, loss or destruction of evidence, it would have to appear that the evidence would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence. Even the mere failure, without more, to produce evidence that naturally would have elucidated a fact at issue permits an inference that the party fears to produce the evidence; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party.¹⁹

Accordingly, the Court must infer at a minimum that the absent recording would be favorable to Yi.²⁰ This is particularly so in the context of a summary-judgment motion where all inferences must be drawn in the non-movant's favor.²¹

Next, the City asserts that Officer Merideth is immune unless “the law clearly proscribed the actions” taken by him.²² The inquiry into whether a right was clearly established must take into account the specific context of the case at hand and not be considered as a broad general proposition.²³ The City asserts that in the specific context of this case, the question is whether it should have been apparent to Officer Merideth that Lamoureaux’s citizen’s arrest was invalid, thereby making Merideth’s action of taking Yi

¹⁹ Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (quotation, citation, and brackets omitted).

²⁰ See Thorne v. Dept. of Public Safety, 774 P.2d 1326, 1330-31 (Alaska 1989); see also Stephan v. State, 711 P.2d 1156, 1159-63 (Alaska 1985) (discussing the duty of the police to record questioning of persons).

²¹ See Clabaugh v. Bottcher, 545 P.2d 172, 175 n.3 (Alaska 1976).

²² Appellees’ Brief at 21 (citing Mitchell v. Forsyth, 472 U.S. 511, 528 (1985)).

²³ Id. (citing Saucier, 533 U.S. at 201).

into custody an unconstitutional arrest.²⁴ According to the City, when the inquiry is framed to take into account the specific context of this case, the Court must conclude that Officer Merideth was entitled to immunity.²⁵

However, contrary to the City's assertion, that Lamoureaux's citizen arrest was invalid was apparent to Officer Merideth. Officer Merideth did not witness Yi's actions, so he knew he could not arrest Yi on misdemeanor charges. The only way to arrest Yi was via citizen's arrest by Max Lamoureaux. However, Lamoureaux claimed that he did not know that he was arresting Yi. In fact, Lamoureaux stated that he believed the police were arresting Yi, and believed that he was merely signing a statement as to the events he witnessed. [Exc. 257] Moreover, Officer Merideth testified that he does not recollect ever explaining citizen's arrest to Lamoureaux, and does not remember explaining to the other officer that the arrest was a citizen's arrest by Lamoureaux. [Exc. 206, 219-220] The fact that Lamoureaux signed the citizen's arrest form so long after the arrest is evidence that Officer Merideth knew he needed to justify the arrest, and attempted to cover up his failure to do so by utilizing Lamoureaux long after the arrest had taken place. Accordingly, Officer Merideth's action of taking Yi into custody was an unconstitutional arrest and Officer Merideth is not entitled to immunity.

At page 11 of the Brief of Appellees, they state in passing that "Yi arguably committed the offense of assault in the third degree, a felony, but was only charged with assault in the fourth degree, a misdemeanor,"²⁶ a contention which they reiterate at page

²⁴ Brief of Appellees at 21.

²⁵ Brief of Appellees at 22.

²⁶ Brief of Appellees at 11 (footnotes omitted).

20 of the Brief of Appellees.²⁷ To the extent that the City and Officer Merideth are thereby asserting an alternate basis for affirming the trial court, their contention is abandoned for cursory, inadequate briefing.²⁸ Moreover, it would be inappropriate for the Court to consider such a contention where, as here, it was not raised below and thus the corresponding factual predicate was never developed via an adversarial response in the trial court.²⁹

In any event, even though Officer Merideth's impressions may not be absolutely dispositive in the jury's ultimate determination, the inferences to be drawn at this time -- in the context of a motion for summary judgment -- are that Yi was not acting toward injuring Lamoureaux but rather in order to stop the vehicle from making its getaway and that the conduct of Yi was such so as to require Officer Merideth to properly follow the citizen's arrest procedures, as Officer Merideth belatedly attempted to do.

B. The State-Law Tort Claim

Again, in the present case, it is undisputed that Yong Yi's freedom was restrained when he was handcuffed and transported to Fairbanks Correctional Center by Fairbanks police officers [Exc. 51-52], and the restraint upon his freedom was executed without legal authority. Fairbanks Police Officer Merideth thus falsely arrested or imprisoned Yi under Alaska tort law because he did not have the legal authority to arrest Yi.

²⁷ At page 20-21 of the Brief of Appellees, the City and Officer Merideth also refer to State v. Morse, 252 A.2d 723, 725-26 (N.J. 1969) for the proposition that when a person admits to the offense, it is permissible to arrest him without a warrant if the chances of finding him at a later time are remote. However, Morse has no basis in federal or Alaska constitutional law and is distinguishable on its facts since Yi is a local business owner who would necessarily be easily locatable at a later time.

²⁸ See Legge v. Greig, 880 P.2d 606, 609 (Alaska 1994).

²⁹ See Lillegraven v. Tengs, 375 P.2d 139, 142 (Alaska 1962).

Contrary to the City's assertion, Officer Merideth is not entitled to qualified immunity, particularly because Officer Merideth's conduct was corrupt, malicious, and in bad faith. Officer Merideth did not do everything he could to ensure that the arrest of Yi was appropriate. Officer Merideth's actions were not objectively reasonable and Officer Merideth did not reasonably believe that his actions were reasonable.³⁰

As mentioned in the foregoing, because Officer Merideth did not witness the Yi's actions, he knew he could not arrest Yi on misdemeanor charges. Accordingly, Officer Merideth acknowledged that the only way to arrest Yi was via citizen's arrest by Max Lamoureaux. Moreover, Officer Merideth testified that he does not recollect ever explaining citizen's arrest to Lamoureaux, and does not remember explaining to the other officer that the arrest was a citizen's arrest by Lamoureaux. [Exc. 206, 219-220] Lamoureaux signed the citizen's arrest form long after the arrest indicating that Officer Merideth knew he needed to justify the arrest, and attempted to cover up his failure to do so by utilizing Lamoureaux long after the arrest had taken place.

In light of the three-factor Aspen analysis for qualified immunity, Officer Merideth clearly violated Yi's rights when he falsely arrested Yi and should not be entitled to immunity in view of his actions at the time and his subsequent cover-up.

III. The City Of Fairbanks Is Not Entitled To Immunity.

The City asserts that Yi suffered no constitutional injury, and thus cannot be held liable under §1983. However, Yi clearly suffered a constitutional injury when Officer Merideth falsely arrested or imprisoned Yi, and deprived Yi of his property. The City

³⁰ See Brief of Appellees at 23-24 (citing Estate of Logusak v. City of Togiak, 185 P.3d 103, 109 (Alaska 2008)).

should have been held liable under §1983 for Yi's false arrest and for the deprivation of Yi's property, including the leased premises, and his cash and other personal property on the premises.

The City has a policy and/or custom of taking people into custody on the basis of a citizen's arrest when the facts support a finding that the crime complained of was committed in the presence of the citizen making the arrest and when the facts support a finding that there is probable cause to believe that the crime was committed by the person accused. [Exc. 61] In other words, the City "has a policy of following the laws of the State of Alaska." [Exc. 61] However, on the morning of December 19, 2004, it is evident that the City failed to train Officer Merideth on this policy. Thus, contrary to the City's assertion, Yi's rights were violated not by Officer Merideth's failure to follow the City's policy, but by the City's failure to train or inadequate training of Officer Merideth. This failure to train, or the inadequate training of Officer Merideth by the City of Fairbanks, amounted to "deliberate indifference" to the right of the Yis to be free from warrantless misdemeanor arrests. More thorough training on appropriately following the laws of the State of Alaska should have been provided to Fairbanks police officers by the City of Fairbanks.

Despite the City's failure to train Officer Merideth, Officer Merideth himself testified that he was following established City policy and procedure [Exc. 206-207], and the City did not dispute that testimony but instead merely asserted that Officer Merideth's actions were a proper citizen's arrest. [Exc. 60-61, 109-110]

The evidence also establishes that Yong Yi suffered a constitutional deprivation of property when the Fairbanks Police Officers denied him and his agents and employees access to the bar and restaurant at the time of arrest to secure personal property, including cash. The evidence clearly indicates that the officers should have followed civil standby procedures subsequent to their arrest of Yi.

The City asserts that Officer Merideth did not have to follow civil standby procedures because the action to evict Yi from the Klondike/Bar Restaurant had already been initiated by Harris Yang before the Fairbanks police arrived.³¹ It is true that the "NOTICE TO QUIT" letter was dated December 10, 2004, instructing Yi to vacate the premises within five days. [Exc. 91] However, this letter was not posted on the door of the Restaurant until Max Lamoureaux did so the morning of December 19, 2004, shortly before the incident began. [Exc. 97] Moreover, the letter certainly is not the same as a court order of eviction and a writ of assistance [Exc. 64-66] which were necessary before Yang could legally evict Yi.

Officer Merideth clearly testified that he lacked familiarity with the civil standby policy other than he was supposed to keep the peace. [Exc. 200-201] Apparently, Officer Merideth's actions were consistent with City policy; however, as mentioned in the foregoing, the City has a policy of following the laws of the State of Alaska, and he should have followed State civil standby procedures. In this case, the City's failure to

³¹ Brief of Appellees at 26.

train Officer Merideth in the proper civil standby procedures resulted in the unconstitutional deprivation of Yong Yi's property rights.³²

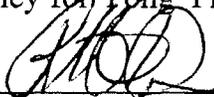
CONCLUSION

For the reasons stated, the Court should reverse the superior court's granting of Officer Merideth's and the City of Fairbanks' Motion for Summary Judgment and should instead hold Officer Merideth and the City liable for falsely arresting or imprisoning Yong Yi and for violating Yi's constitutional rights. Yong Yi respectfully prays that the Court so order.

RESPECTFULLY SUBMITTED this 13th day of May, 2011.

LAW OFFICE OF ROBERT JOHN
Attorney for Yong Yi

By: _____



Robert John
Alaska Bar No. 8911069
P.O. Box 73570
Fairbanks, Alaska 99707
907-456-6056

³² See King v. Massarweh, 782 F.2d 825 (9th Cir. 1986).