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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOSE DECASTRO,

Plaintiff

v.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT, et al.,

Defendants

Case No.: 2:23-cv-00580-APG-EJY

**Order Denying Defendants' Renewed
Motion for Summary Judgment**

[ECF No. 102]

Plaintiff Jose DeCastro sues the Las Vegas Metropolitan Police Department (LVMPD) and several LVMPD officers,¹ contending that the officers unreasonably searched and seized him while he was exercising his First Amendment rights to video record a police encounter and making rude comments to the arresting officer. He also alleges they used excessive force. I previously granted in part the defendants' motion for summary judgment. ECF No. 100. In that order, I also granted in part DeCastro's motion to reconsider my order dismissing several of his state law claims. *Id.* Recognizing that the defendants may not have fully briefed these previously dismissed claims for summary judgment, I granted limited leave to move for summary judgment on the reinstated claims. *Id.* at 49-51.

The defendants now move for summary judgment on DeCastro's state law claims for false arrest, unlawful search and seizure, and invasion of privacy, arguing that the officers are entitled to discretionary-act immunity. ECF No. 102. They also argue that DeCastro's invasion of privacy claim fails because he did not have a reasonable expectation of privacy. DeCastro

¹ The individual officers are Branden Bourque, Jason Torrey, Chadly Dingle, Brandon Sorenson, Jesse Sandoval, and Clinton Doolittle. DeCastro also sued the State of Nevada and an officer named Citco, but I dismissed those defendants for failure to timely serve them. ECF Nos. 85, 94.

1 responds that the officers' actions were not discretionary, their actions were made in bad faith,
2 and he had a reasonable expectation of privacy.

3 The parties are familiar with the facts, so I repeat them here only as necessary to decide
4 the motion. I deny the defendants' motion for summary judgment because I previously declined
5 to hold that the officers had probable cause to arrest DeCastro as a matter of law. If the officers
6 lacked probable cause, then their acts violated the federal Constitution and were not
7 discretionary. And DeCastro has a reasonable expectation of privacy in his personal effects
8 against illegal searches, such as a search incident to an unlawful arrest.

9 **I. DISCUSSION**

10 Summary judgment is appropriate if the movant shows "there is no genuine dispute as to
11 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
12 56(a). A fact is material if it "might affect the outcome of the suit under the governing law."
13 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence
14 is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The party
15 seeking summary judgment bears the initial burden of informing the court of the basis for its
16 motion and identifying those portions of the record that demonstrate the absence of a genuine
17 issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts
18 to the non-moving party to set forth specific facts demonstrating there is a genuine issue of
19 material fact for trial. *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) ("To
20 defeat summary judgment, the nonmoving party must produce evidence of a genuine dispute of
21 material fact that could satisfy its burden at trial."). I view the evidence and reasonable
22 inferences in the light most favorable to the non-moving party. *Zetwick v. Cnty. of Yolo*, 850 F.3d
23 436, 440-41 (9th Cir. 2017).

1 **A. False arrest and unlawful search and seizure**

2 The defendants argue that they are immune from DeCastro’s false arrest and unlawful
3 search claims because a police officer’s decision to arrest or search an individual is a
4 discretionary function. DeCastro responds that I have already ruled on this issue and that
5 discretionary acts made in bad faith are not protected.

6 Nevada officials are immune from lawsuits “[b]ased upon the exercise or performance or
7 the failure to exercise or perform a discretionary function . . . whether or not the discretion
8 involved is abused.” Nev. Rev. Stat. § 41.032(2). Nevada has adopted the United States
9 Supreme Court’s *Berkovitz-Gaubert*² test to determine if discretionary-function immunity
10 applies. *Martinez v. Maruszczak*, 168 P.3d 720, 729 (Nev. 2007) (en banc). For an official act to
11 receive immunity, it must “(1) involve an element of individual judgment or choice and (2) be
12 based on considerations of social, economic, or political policy.” *Id.* For the second element, I
13 must consider “whether the judgment is of the kind that the discretionary-function exception was
14 designed to shield.” *Id.* at 728 (cleaned up).

15 A decision by police officers “as to how to accomplish a particular seizure or search is
16 generally considered a discretionary determination under Nevada law.” *Davis v. City of Las*
17 *Vegas*, 478 F.3d 1048, 1059 (9th Cir. 2007). But acts committed in bad faith are definitionally
18 outside the actor’s discretion. *Falline v. GNLV Corp.*, 823 P.2d 888, 891-92 (Nev. 1991). And
19 government officials “do not possess discretion to violate constitutional rights.” *Galvin v. Hay*,
20 374 F.3d 739, 758 (9th Cir. 2004) (quotation omitted); *see also Nurse v. United States*, 226 F.3d
21 9996, 1002 n.2 (9th Cir. 2000) (holding that “the Constitution can limit the discretion of federal
22 officials such that the FTCA’s discretionary function exception will not apply”).

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² *Berkovitz v. United States*, 486 U.S. 531 (1988); *United States v. Gaubert*, 499 U.S.315 (1991).

1 Genuine questions of material fact remain on DeCastro's state law claims for false arrest
 2 and unlawful search and seizure. I previously reconsidered my decision holding that probable
 3 cause existed as a matter of law and allowed that matter to go to the jury. If the defendants
 4 lacked probable cause to arrest DeCastro and perform a subsequent search incident to arrest, then
 5 those actions violate the Fourth Amendment of the Constitution and fall outside the officers'
 6 discretion. I therefore deny the defendants' motion for summary judgment on DeCastro's state
 7 law false arrest and unlawful search and seizure claims.

8 **B. Invasion of privacy**

9 The defendants argue that DeCastro's invasion of privacy claim fails because their search
 10 of DeCastro was a discretionary function and DeCastro had no reasonable expectation of
 11 privacy. According to the defendants, DeCastro had no reasonable expectation of privacy
 12 because he instigated the encounter with the officers and his behavior was provocative and
 13 uncooperative. DeCastro responds that his behavior was constitutionally protected, and he
 14 maintained a reasonable expectation of privacy in his personal effects.

15 For the tort of intrusion,³ DeCastro must prove (1) "an intentional intrusion (physical or
 16 otherwise)," (2) on DeCastro's solitude or seclusion, (3) "that would be highly offensive to a
 17 reasonable person." *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895
 18 P.2d 1269, 1279 (Nev. 1995), *rev'd on other grounds by City of Las Vegas Downtown*
 19 *Redevelopment Agency v. Hecht*, 940 P.2d 134 (Nev. 1997). The Supreme Court of Nevada

21 ³ The Restatement (Second) of Torts describes four torts that fall under the invasion of privacy:
 22 (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the name or
 23 likeness of another; (3) unreasonable publicity given to private facts; and (4) publicity
 unreasonably placing another in a false light before the public. *Bobby Berosini*, 895 P.2d at 1278;
 Restatement (Second) of Torts § 652A. Both the defendants and DeCastro appear to analyze
 DeCastro's claim as one arising from an unreasonable intrusion upon his seclusion.

1 noted examples of such intrusions include “the meddling conduct of eavesdroppers, the
2 unpermitted opening of others’ mail, and the making of illegal searches and seizures.” *Id.*
3 However, police acting within their powers do not intrude on any expectation of privacy
4 protected by the law. *See Id.* at 1279.

5 A genuine dispute remains whether DeCastro had a reasonable expectation of privacy in
6 his personal effects despite his provocative behavior towards the officers. DeCastro’s invasion
7 of privacy claim is specific to “the contents of his personal belongings such as vehicles, pockets,
8 wallets, cell phones[,] and other electronic devices.” ECF No. 61 at 27-28. Although DeCastro
9 had no reasonable expectation of privacy in his public interaction and behavior, the contents of
10 his pockets and closed containers remained private and protected from unlawful searches. *See*
11 *Katz v. United States*, 389 U.S. 347, 351 (1967) (noting that “what a person knowingly exposes
12 to the public” is not protected by the Fourth Amendment, while “what he seeks to preserve as
13 private, even in an area accessible to the public, may be constitutionally protected”). If the
14 officers lacked probable cause to arrest and search DeCastro, then their search of his person was
15 unlawful. Because genuine disputes remain whether the officers had probable cause, I cannot
16 rule as a matter of law that they were acting within their discretionary authority or that DeCastro
17 lacked a reasonable expectation of privacy protected by the law. I therefore deny the defendants’
18 motion for summary judgment on DeCastro’s invasion of privacy claim.

19 II. CONCLUSION

20 I THEREFORE ORDER that the defendants’ renewed motion for summary judgment
21 (ECF No. 102) is **DENIED**.

22 DATED this 24th day of April, 2025.

23 

ANDREW P. GORDON
CHIEF UNITED STATES DISTRICT JUDGE