NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

TARAHAWK VON BRINCKEN, Plaintiff-Appellee, v. JAMES MICHAEL VOSS and RICHARD A. LEGARRA, Defendants-Appellants.	No. 15-17025 D.C. No. 4:14-cv-02148-JAS MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Argued and Submitted October 18, 2016
San Francisco, California

Before: THOMAS, Chief Judge, and BEA and IKUTA, Circuit Judges.

Tucson police officers James Voss and Richard Legarra appeal the district court's order granting Tarahawk von Brincken's motion for partial summary judgment on von Brincken's 42 U.S.C. § 1983 and state-law false imprisonment claims and denying Voss and Legarra's motion for summary judgment, which

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

asserted a qualified-immunity defense. We have jurisdiction over the issue of qualified immunity under 28 U.S.C. § 1291, *see Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), and reverse.

The district court erred when it denied Voss and Legarra's motion for summary judgment. Voss and Legarra are entitled to qualified immunity unless von Brincken shows "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct," *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011), which he has not done. An official violates a clearly established right if "every 'reasonable official would have understood that what he is doing violates that right.'" *Id.* at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In determining whether qualified immunity applies, the Supreme Court has reminded us "not to define clearly established law at a high level of generality." *Id.* at 742. "The general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Id.*

An officer in Voss's position could reasonably believe that Arizona Revised Statutes section 28-3169(A) required that von Brincken produce his driver's license upon Voss's demand, and that section 28-622 in turn made von Brincken's

refusal to comply with Voss's lawful order a misdemeanor.[1] While Voss subjectively believed that von Brincken's refusal to present his license violated a different statute, section 28-1595(B), an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause," *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). Because an officer in Voss's position could reasonably believe von Brincken committed a misdemeanor in his presence, Voss and Legarra could reasonably believe that Voss had the authority to arrest von Brincken, *see* Ariz. Rev. Stat. § 13-3883(A)(2), and that the arrest would not violate von Brincken's Fourth Amendment rights, *see Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Because Voss and Legarra could reasonably believe that their conduct complied with the law, and any unlawfulness was not clearly established (even assuming their conduct was unlawful), they are entitled to qualified immunity. *See Pearson v. Callahan*, 555 U.S. 223, 244–45 (2009).

REVERSED.

[1] To the extent that Voss and Legarra did not argue or brief this argument before the district court, we nonetheless "may consider an issue raised for the first time on appeal" where, as here, "the issue presents a pure question of law that does not depend on the factual record developed below, or the relevant record is fully developed." *Emmert Indus. Corp. v. Artisan Assocs., Inc.*, 497 F.3d 982, 986 (9th Cir. 2007).

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von Brincken v. Voss, No. 15-17025

THOMAS, Chief Judge, dissenting:

The Fourth Amendment serves to ensure that one may not be arrested on suspicion of non-criminal conduct. Because Officers Voss and Legarra arrested Tarahawk von Brincken without probable cause to believe he had committed a crime, the Officers violated von Brincken's clearly established constitutional rights. Therefore, the Officers are not entitled to qualified immunity, as the district court correctly held. Because I agree entirely with the district court's analysis on this issue, I must respectfully dissent.

The Fourth Amendment to the US Constitution protects people from unreasonable searches and seizures. U.S. Const. amend. IV. The Supreme Court has held that "Fourth Amendment seizures are reasonable only if based on probable cause to believe that the individual has committed a crime." *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013). Officer Voss relied on Arizona Revised Statute § 28-921(A)(1) (driving an improperly equipped vehicle) and § 28-1595(B) (failure to produce identification) as his authority for arresting von Brincken. However, the former statute is a civil traffic offense that does not subject one to arrest for criminal conduct. *See Allen v. City of Portland*, 73 F.3d 232, 237 (9th Cir. 1995), *as amended* (Jan. 17, 1996) ("[P]robable cause can only

exist in relation to criminal conduct."). The latter statute subjects a driver to arrest for criminal conduct for not producing a driver's license upon the request of an officer only if the officer first conducted a traffic stop of the driver. *See In re Moises L.*, 18 P.3d 1231, 1232 (Ariz. Ct. App. 2000), *as amended* (Feb. 8, 2001) ("Under § 28-1595(B), a motor vehicle operator stopped by a peace officer must exhibit an 'operator[']s driver license.'"). Because it is undisputed that Officer Voss did not conduct a traffic stop of von Brincken before demanding to see his driver's license, the arrest for failure to produce the driver's license lacked probable cause and was therefore unconstitutional. To hold otherwise, as the majority does, turns a traffic offense statute into a "stop and show me your papers" statute.

Furthermore, the right to be free from unreasonable seizures was clearly established at the time of von Brincken's arrest. This is so even though the Arizona Supreme Court has not previously held that being pulled over while driving is a prerequisite to a reasonable arrest pursuant to Arizona Revised Statute § 28-1595(B). *See Demuth v. Cty. of Los Angeles*, 798 F.3d 837, 839 (9th Cir. 2015) ("While the law must be unambiguous to overcome qualified immunity, that doesn't mean that every official action is protected . . . unless the very action in question has previously been held unlawful. [O]fficials can still be on notice that

their conduct violates established law even in novel factual circumstances. This is especially true in the Fourth Amendment context, where the constitutional standard— reasonableness—is always a very fact-specific inquiry.") (internal citations and quotation marks omitted).

Officers Voss and Legarra violated von Brincken's clearly established constitutional right to be free from an unreasonable seizure. As a result, they are not entitled to qualified immunity, as the district court properly held.

I respectfully dissent.

United States Court of Appeals for the Ninth Circuit

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95 Seventh Street
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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

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I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk